

RESISTING DEEP CAPTURE: THE COMMERCIAL SPEECH DOCTRINE AND JUNK-FOOD ADVERTISING TO CHILDREN

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[W]hen men [and women] have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution.¹

—Justice Oliver Wendell Holmes

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.²

—(Then) Justice William Rehnquist

I. INTRODUCTION

In a recent article, *Broken Scales: Obesity and Justice in America*, my co-authors and I examined the ways in which the food industry has exercised powerful influence, often in unseen ways, over consumer behavior in the fast food market, even as the industry has evaded responsibility for the ensuing obesity epidemic by promoting to regulators, as well as to consumers themselves, the view that consumer behavior in the food market reflects the preference driven choices of individual consumers, which the industry claims merely to satisfy.³

1. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting).

3. Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) [hereinafter *Broken Scales*]. Of course, *Broken Scales* is just one piece in an extensive, and growing, body of scholarship dedicated to understanding the relationship between food industry practice and the obesity epidemic. See, e.g., KELLY D. BROWNELL & KATHERINE BATTLE HOGEN, *FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO*

Broken Scales sought to apply, in the context of the obesity epidemic, an innovative approach to legal theory that my co-authors and I call "critical realism."⁴ *Broken Scales* was chiefly concerned with applying this innovative conceptual framework to a broad analysis of the fundamental legal-theoretic and social policy issues surrounding the obesity crisis.⁵ The present Article is more precisely dedicated to analyzing, from a critical realist perspective, the wisdom and constitutional viability of one possible policy response to the obesity crisis: a ban on junk-food⁶ advertising to children.⁷

This Article seeks not only to show that an effective junk-food advertising ban could pass constitutional scrutiny, but also to demonstrate, through the rigor of a constitutional analysis, the wisdom of such an approach to this substantial social problem. Simultaneously, my purpose is to show, in the context of a difficult First Amendment question, that the critical realist approach to legal theory is capable of yielding substantial analytic insights, jurisprudential innovations, and public policy contributions.⁸

II. THE CASE FOR BANNING JUNK-FOOD ADVERTISING TO CHILDREN

A. *It's Hard to Put it Better than Justice Thomas*

The case for banning junk-food advertising to children was made succinctly and persuasively by Justice Thomas in a recent case involving Massachusetts's ultimately unsuccessful effort to ban, *inter alia*, tobacco billboard advertising directed at children⁹:

ABOUT IT (2004) (elaborating Brownell and Battle's conception of "the toxic environment" and its relationship to overweight and obesity).

4. For a brief synopsis of critical realism, see Part II.B.1.

5. *Broken Scales*, *supra* note 3.

6. For the purposes of this Article, the term "junk food" refers to highly caloric food that is relatively high in sugar and/or fat content and relatively low in nutritional value. There may be debate at the periphery about what food products qualify for this categorization, but that debate is not crucial to the analytic issues under review.

7. Below, I will argue that an effective ban on junk-food advertising to children must be conceived of programmatically, and for the purposes of constitutional analysis, as involving a substantial limitation on such advertising to adults as well as children, and thus as a near total ban on junk-food advertising altogether. See *infra* text accompanying notes 150–152.

8. See *infra* note 21 (summarizing other work in critical realism).

9. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

The *second* largest contributor to mortality rates in the United States [after "tobacco use"] is obesity.^[10] It is associated with increased incidence of diabetes, hypertension, and coronary artery disease, and it represents a public health problem that is rapidly growing worse.^[11] Although the growth of obesity over the last few decades has had many causes, a significant factor has been the increased availability of large quantities of high-calorie, high-fat foods.^[12] Such foods, of course, have been aggressively marketed and promoted by fast food companies.^[13]

Respondents say that tobacco companies are covertly targeting children in their advertising. Fast food companies do so openly. . . . Moreover, there is considerable evidence that they have been successful in changing children's eating behavior.^[14] The effect of advertising on children's eating habits is significant for two reasons. First, childhood obesity is a serious health problem in its own right.^[15] Second, eating preferences formed in childhood tend to persist in adulthood.^[16] So even though fast food is not addictive in the same way tobacco is, children's exposure to fast food advertising can have deleterious consequences that are difficult to reverse.¹⁷

10. *Id.* at 587 (citing Jeffrey P. Koplan & William H. Dietz, *Caloric Imbalance and Public Health Policy*, 282 JAMA 1579 (1999)).

11. *Id.* (citing Ali H. Mokdad et al., *The Spread of the Obesity Epidemic in the United States, 1991–1998*, 282 JAMA 1519 (1999)).

12. *Id.* (citing James O. Hill & John C. Peters, *Environmental Contributions to the Obesity Epidemic*, 280 SCIENCE 1371 (1998)).

13. *Id.* (citing Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, U.S. Dept. of Health and Human Services, 115 PUB. HEALTH REP. 12, 18 (2000)).

14. *Id.* at 588 (citing Dina L. G. Borzekowski & Thomas N. Robinson, *The 30-Second Effect: An Experiment Revealing the Impact of Television Commercials on Food Preferences of Preschoolers*, 101 J. AM. DIETETIC ASS'N 42 (2001); Howard L. Taras et al., *Television's Influence on Children's Diet and Physical Activity*, 10 J. DEV. & BEHAV. PEDIATRICS 176 (1989)).

15. *Id.* at 588 (citing Richard P. Troiano & Katherine M. Flegal, *Overweight Children and Adolescents*, 101 PEDIATRICS 497 (1998)).

16. *Id.* (citing Leann L. Birch & Jennifer O. Fisher, *Development of Eating Behaviors Among Children and Adolescents*, 101 PEDIATRICS 539 (1998)).

17. *Id.* at 587–88 (Thomas, J., concurring).

Thomas meant his exegesis here facetiously. It was a step in his argument, concurring with the Court's holding in *Lorillard Tobacco Co. v. Reilly*, that the First Amendment forbids Massachusetts's tobacco advertising restrictions.¹⁸ His purpose in the passage above, apparently, was to point to the absurdity of banning junk-food advertising as support for his view that the tobacco-advertising ban at issue in *Lorillard* was unconstitutional.¹⁹ In Part III, below, I will engage the constitutional issues posed by a ban on junk-food advertising to children.²⁰ For present purposes, however, irony aside, Thomas's summary provides an excellent starting point for appreciating the enormity of the childhood obesity problem, and the role that junk-food advertising plays in it.

B. Fleshing Out the Case

1. Critical Realism and the Situational Character

Before further examining the relationship between childhood obesity and junk-food advertising, and the wisdom of an advertising ban, it is crucial to first establish the critical realist perspective.²¹

18. *Id.* at 589–90 (Thomas, J., concurring).

19. The quotation above is preceded by Thomas's warning that "it seems appropriate to point out that to uphold the Massachusetts tobacco regulations would be to accept a line of reasoning that would permit restrictions on advertising for a host of other products." *Id.* at 587.

20. *See infra* Part III.

21. Professor Hanson and I explicated the basic elements of critical realism in Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 102 U. PA. L. REV. 129 (2003) [hereinafter, Hanson & Yosifon, *The Situation*]. In a companion article, Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L. J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*], we provided a full-length assessment of the social science on which the model of human agency adopted in critical realism is based. In *Broken Scales*, we joined with Adam Benforado to apply critical realism to an analysis of the obesity problem. *Broken Scales*, *supra* note 3. For other applications and elaborations of critical realism, see also Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24 (2005); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004).

Critical realism begins legal analysis with a conception of human agency that differs dramatically from that adopted in much conventional legal theory, but one that is very familiar to other social sciences that are dedicated to studying how humans actually think and behave. Deeply steeped in social psychology, and allied social sciences, critical realism strives to establish a perspective on human agency that transcends our intuitive conception of the sources of our own conduct, especially in those areas of experience where our intuitions about ourselves may be wrong, or misguided. To that end, critical realism embraces a counterintuitive sensitivity to profoundly influential, though largely hidden, cognitive, biological, and psychological processes that encourage us humans to view our own behavior, and other peoples' behavior, as being driven largely by the dictates of individual *disposition*, and to miss the pervasive *situational influences* on behavior.²² Critical realism refers to this distorted self-conception, which all humans share to varying degrees, as *dispositionism*, because it magnifies the role of disposition and misses the powerful role of unseen situational influence on human behavior.²³

The figure of the "rational actor" that has become so widespread in legal analysis through the influence of the law and economics movement is a formalized elaboration of the basic dispositionist misconception.²⁴ The rational actor, in essence, is an actor who

22. "Disposition" refers to our intuitive experience of our own thoughts, in particular our own individually ordered opinions and preferences which we carry within us to different behavioral contexts, and our intuitive experience of our own will manifesting our dispositions in our behavior. See generally Hanson & Yosifon *The Situational Character*, *supra* note 21, at 6–31 (elaborating this conception of disposition and dispositionism). "Situational influences," as Hanson and I use the phrase, represent those features of the external world—the framing of information, for example, which influence our thoughts and behaviors in ways we do not appreciate, instead mistakenly attributing the sources of our thoughts and behaviors to our own dispositions. Somewhat more subtly, we also refer to "internal" situational influences, which are those features of our inner lives—our cognitive biases, knowledge structures, motivations, visceral factors, etc.—which influence profoundly our thinking and behavior, but which are opaque to our conscious awareness of ourselves. See generally *id.* at 32–36 (elaborating this notion of internal and external situation).

23. See Hanson & Yosifon, *The Situation*, *supra* note 21, at 250–59 (discussing cross-cultural differences in degrees of dispositionism).

24. See *id.* at 144–52 (scrutinizing the "myth of the rational actor").

attempts to maximize her own preferences by making rational choices among options that are available to her. The dispositional/rational actor's preferences are thought, in our intuitions and in the model, to be "revealed" through the choices she freely makes, especially in market contexts.²⁵ Such presumptions pervade the law and legal theory, which, together with much of our intuitive thinking about ourselves, may be described as unduly *dispositionist* in failing to perceive and comprehend the significance of situational influences on human behavior.

In an effort to retire and replace the "rational actor" and its dispositionist cousins, and to fashion a more critically informed model of human behavior for use in legal theory, Professor Hanson and I introduced a figure that we call the "situational character."²⁶ The situational character encapsulates central lessons about human agency that emerge from the fields of social psychology, political theory, behavioralism, and economics, while highlighting the misconceptions that permeate so much conventional thinking about human behavior in lay and legal theoretic discourse.²⁷ Our character derives from many overlapping areas of social scientific research, which we examine at length in *The Situational Character: A Critical Realist Approach to the Human Animal*.²⁸

A summary of some of the salient points of that Article serves as necessary background for this Article: We humans have limited perceptive and cognitive capacity.²⁹ We take in and make sense of only limited aspects of the world around us.³⁰ We have thus, of necessity, developed heuristics—cognitive "rules of thumb"—that

"Behavioral law and economics" has emerged as a movement seeking to adapt some lessons of various social and psychological sciences to try to make the "rational actor" more realistic. In Hanson & Yosifon, *The Situational Character*, we argue that this work has been characterized by far-too dedicated a commitment to the basic rational actor model, and basic dispositionist presumptions. *See id.* (analyzing "Five Types of Inadequate Realism").

25. In economics, this is known as the "generalized axiom of revealed preferences." *See* Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 152–70.

26. *See* Hanson & Yosifon, *The Situation*, *supra* note 21, at 149–79; *see also* Hanson & Yosifon, *The Situational Character*, *supra* note 21.

27. Hanson & Yosifon, *The Situational Character*, *supra* note 21.

28. *Id.*

29. *Id.* at 152–54.

30. *Id.*

allow us to make sense of the world and move in it without having to constantly perform an exhaustive analysis of what is actually going on in the world.³¹ These rules of thumb serve us well, but they are imperfect, and they lead to systematic biases in our thinking.³² Among these biases, or, really, a way of theorizing across our aggregated biases, is *dispositionism*.³³ Our conscious awareness is limited to a few highly salient features of the external world (most prominently, ourselves moving in it), and a few highly salient features of our inner lives (such as our conscious thoughts, preferences, and the experiences of will—collectively, our dispositions).³⁴ Unless there is some highly salient situational influence clearly overbearing dispositional choice—a proverbial "gun to the head"³⁵—we mistakenly attribute our own and other people's behavior to those limited features of our external and internal worlds of which we are consciously aware, to the exclusion of appreciating the ways in which we are moved by powerful situational influences in the world around us, and unseen features of the world within us.³⁶

Also fundamental to the situational character, yet absent both from the formal rational actor model and the intuitions behind the usually unnamed dispositional actor prevalent in conventional legal theory, are powerful internal *motivations* that shape our receipt and processing of information, and drive us towards opinions and behaviors in ways that we do not appreciate.³⁷ We are motivated, for example, to view ourselves in a self-affirming fashion.³⁸ We are further motivated, as social psychologists have well documented,³⁹ to view in an affirmative fashion the groups and social systems of

31. *Id.* at 167–74.

32. *Id.* at 157–66.

33. *Id.*

34. See BRUCE G. CHARLTON, *PSYCHIATRY AND THE HUMAN CONDITION* app. (2000) (discussing the evolution and cognitive neuroscience of awareness and consciousness).

35. See, e.g., Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 167–74 (developing the notion of highly salient situational influence through the use of a hypothetical situational character threatened by a gunman).

36. See *id.* at 90–114 (reviewing dozens of social scientific experiments that reveal and elaborate these concepts).

37. See *id.*

38. See *id.* at 138.

39. *Id.*

which we are a part.⁴⁰ We tend to receive and process information in a manner that supports these motivations.⁴¹ They are a central and powerful feature of our inner lives and they continually give shape to our interactions with the external world—but we are usually blind to them. Even as we engage in motivated reasoning regarding ourselves, our groups, and our social system, we believe ourselves to be reasoning objectively, fairly, and rationally.⁴² It is in this sense that these motivations are *situational*; though hidden, they constitute an influential aspect of our situational character.⁴³ The fact that we tend not to appreciate the influence of these motivations on our thoughts and behaviors contributes substantially to our dispositionism.⁴⁴

Beneath these cognitive and motivational processes are deeply laden "visceral factors," which influence us profoundly, but which we tend not to see, or if we do see, often misunderstand.⁴⁵ Such visceral factors include our eating and sexual systems, and also, at a deeper remove, our experience of will.⁴⁶ Consider the eating system, apropos as it is to the present inquiry.⁴⁷ We humans tend to believe that our experience of hunger is directly related to our body's imminent need for food. We eat because we are hungry, and believe we feel hungry because we need to eat. But we are mistaken.

40. See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 430 (1999).

41. See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 80–81 (1991) (discussing the tendency of group members to develop "group-serving bias.").

42. See Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 155–57.

43. Internal situational influences such as motivations are particularly vulnerable to external situational manipulation, because their operation is largely hidden from our conscious scrutiny. See *Broken Scales*, *supra* note 3, at 1694–99 (describing specific examples of corporate manipulation of consumer motivations).

44. See *id.* at 1708–11.

45. See Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 120–22 (discussing visceral factors).

46. See *id.* at 128–33 (describing the experience of will as the crown-jewel of the dispositional self-conception); *Broken Scales*, *supra* note 3, at 1675–87 (discussing the human eating system).

47. Cf. David Yosifon, *The Costs of Pornography: Sexual Exploitation and Deep Capture* (in progress) (unpublished manuscript, on file with author) (analyzing the consumer market in pornography).

Scientists have demonstrated that our experience of hunger is largely unrelated to our body's imminent or even short-term need for food.⁴⁸ Instead, the symptoms that we associate with the experience of hunger, for example a palpable drop in blood sugar, are actually caused by the body's eating system preparing itself for the anticipated intake of food, and the massive amount of blood sugar that comes with it.⁴⁹ Thus, hunger is caused not so much by the body's need for food, but by the body's anticipation of eating. Now, scientists have also demonstrated that due to the fact that the problem of food *scarcity* has bedeviled human society throughout most of our history on Earth, we long-ago evolved eating systems that are oriented towards consuming as much food as possible, especially highly caloric food, whenever food is *available*, irrespective of the body's present energy needs.⁵⁰ The body stores excess energy as fat for use during lean times.⁵¹ This may have served us well in times of food scarcity, but in the modern world, where for many food is made more or less constantly available, it can be powerfully misleading, even deadly. Visceral factors such as hunger and eating fundamentally shape our situational character, yet their influence is obscure to our intuitive experience of ourselves.⁵²

The fact that situation is both highly influential *and* unseen suggests that where situation can be controlled, situational characters can be influenced in ways they will tend not to appreciate. Indeed, that this is true has been demonstrated time and time again in the hundreds of social scientific experiments revealing the features of the situational character just described, as well as many others.⁵³ Social scientists repeatedly and predictably manipulate the thoughts and behaviors of subjects in ways the subjects do not appreciate, often by taking advantage of one or another bias, motivation, or visceral

48. John P.J. Pinel et al., *Hunger, Eating, and Ill Health*, 55 AM. PSYCHOLOGIST 1105, 1111 (2000) (attributing self-regulation of eating to environmental factors).

49. Blood sugar levels would become dangerously high if the body did not lower its blood sugar levels before the influx began. *See Broken Scales, supra* note 3, at 1681–84.

50. *Id.* at 1675.

51. *Id.*

52. *See id.*

53. LEE ROSS & RICHARD E. NESBITT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 66 (1991).

factor that the scientist is exploring.⁵⁴

Critical realism, having drawn on social science to establish this realistic conception of human agency, at this point turns to some highly probative principles of economics to make the prediction that while lay people are dispositionists, and while legal theorists have too often been dispositionist, market actors—i.e., corporations—will discover the *truth* about who we are and what moves us. Corporations will appreciate that we are situational characters because they have an enormous incentive to know, and a tremendous capacity to find out.⁵⁵ The competitive pressures of the market will compel profit-maximizing corporations to discover and exploit methods of exercising unseen situational influence over consumer behavior, in the same way that market forces compel firms to devise and employ the most efficient forms of business organization.⁵⁶ Because the market will drive firms in this direction, rewarding with profit firms that do it and rendering bankrupt those that do not, corporations may come to engage in manipulative situational influence vis-à-vis consumers even without any human beings within the corporation consciously desiring to do so. Thus, in the context under scrutiny here, competitive pressures will force firms selling junk food to discover and exploit ways of influencing junk-food consumption, even where individual corporations claim not to, or even where all corporate officers promise to espouse social responsibility in their business practices. Firms that fail to exploit opportunities for unseen situational influence over consumers will die out, those that even happen to stumble mistakenly on mechanisms of situational influence will thrive. Hanson and I call this process "power economics."⁵⁷

54. See generally Hanson & Yosifon, *The Situational Character*, *supra* note 21 (emphasizing throughout that nearly every study reviewed suggests human vulnerability to unseen situational manipulation).

55. See Hanson & Yosifon, *The Situation*, *supra* note 21, at 219–23.

56. See *id.* at 218.

57. See *id.* at 193–201 (discussing power economics). Below I will argue that the problem presented by power economics militates in favor of a near total ban on junk-food advertising, rather than a ban on specific modes or methods of advertising. See *infra* Part II.D. This is because power economics predicts that market forces will compel corporations to engage in manipulative practices even where the mechanics of such practices are not consciously understood or intentionally deployed by corporate managers. See *infra* Part II.C.2.

This approach thus predicts that corporations will strive to exercise unseen situational influence over consumers. Certainly such influence extends through the stimulation of consumption, as we shall soon see that it has in the junk-food market. But critical realism further predicts that one of the crucial ways that corporations will exercise situational influence is by cultivating, promoting, and entrenching *dispositionism*, to regulators, and to consumers themselves. While corporations appreciate the fact that people are situational characters, they have a great stake in widespread dispositionism, because it is this outlook that places responsibility for any bad outcomes associated with consumer behavior squarely on consumers themselves, rather than on the situational influences that may be driving that behavior. We call this process "deep capture."⁵⁸

Broken Scales was dedicated to elaborating these concepts and testing these predictions in the specific context of the obesity epidemic.⁵⁹ We examined in some detail the ways in which the food industry has powerfully shaped consumer behavior in this area, and how the industry has evaded responsibility for having done so by pursuing deep capture.⁶⁰ The present Article will next first further explore the nature of the obesity epidemic, specifically the relationship between junk-food advertising and childhood obesity. Thereafter, I proceed to the conceptual heart of the Article, which is an analysis, from the critical realist perspective, of the constitutional issues implicated in what I propose would be one very effective regulatory response to the problem of childhood obesity—a legislative ban on junk-food advertising to children.⁶¹

58. See Hanson & Yosifon, *The Situation*, *supra* note 21, at 202–30 (describing the “deep capture” hypothesis). “Deep capture” is an extension of the concept of administrative “capture” in public-choice theory. Economists have long appreciated that industry often succeeds in influencing (“capturing”) the administrative agencies charged with regulating industry conduct. Conventional capture theory, however, has failed to recognize that there are many more capture-worthy and capturable institutions that bear on corporate profit, not the least of which is consumers’ conceptions of the sources of their own behavior. *Id.* For sources discussing conventional agency capture, see David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 105 n. 37 (2000).

59. *Broken Scales*, *supra* note 3, at 1648–54.

60. *Id.* at 1689–1720.

61. See *infra* Part II.D.

2. Childhood Obesity and Junk-Food Advertising

According to the Centers for Disease Control and Prevention, 16 percent of U.S. children ages 6 to 19—around 9 million children—suffer from obesity.⁶² This is triple the rate of three decades ago, and the trend shows no signs of slowing.⁶³ The obesity epidemic is bringing with it widespread human suffering—in the form of diabetes, diseases of the heart, liver, and kidneys, depression, and premature death, as well as an enormous social cost in terms of public healthcare expenditures dedicated to dealing with these conditions.⁶⁴

There are, no doubt, many contributing factors to the childhood obesity epidemic. To understand what part corporate behavior plays in it, we must understand that market forces compel successful firms in the junk-food industry to exploit any situational advantage they can to influence children to consume their products.⁶⁵ One very powerful method of situational influence that firms have at their disposal is advertising.⁶⁶ The most widespread advertising method is the use of broadcast promotions on television for junk-food products.⁶⁷ Billboard and print advertising in newspapers and magazines are other familiar and widespread methods.⁶⁸ More recently, market pressures have led to the creation of innovative forms of advertising, including in schools, on the Internet, through

62. *Prevalence and Trends in Overweight Among US Children and Adolescent, 1999–2000*, 288 JAMA 1728, 1729 (2002). More than thirty percent of the adult population in the United States—sixty million people—is obese. *Id.*

63. *Id.*

64. The U.S. Centers for Disease Control and Prevention estimates the direct medical costs of overweight and obesity at almost ninety-three billion dollars *per year*, with about half of that being paid from public funds through government health care programs. *Broken Scales*, *supra* note 3, at 1650–51.

65. See *supra* text accompanying notes 55–58 (making this argument).

66. Of course, advertising is by no means the only mechanism by which the junk food industry exercises situational influence. Other methods involve making junk-food products ubiquitously available to consumers, a ubiquity which shapes, and does not merely reflect, consumer preferences. See *Broken Scales*, *supra* note 3, at 1691–99.

67. See *id.* at 1700–01.

68. See CMTY. ANTI-DRUG COAL. OF AMER. & CTR. FOR SCI. IN THE PUB. INTEREST, ALCOHOL ADVERTISING: ITS IMPACT ON COMMUNITIES, AND WHAT COALITIONS CAN DO TO LESSEN THAT IMPACT, http://www.cspinet.org/booze/Alcohol_Advertising.pdf (last visited Apr. 5, 2006).

cell phones, and through product placement and promotion directly in the content of entertainment programming.⁶⁹ Social scientists have been somewhat slow to study these innovative methods of advertising, slower, anyway, than corporations have been.⁷⁰ There is, however, a formidable body of social science analyzing conventional methods of advertising to children, in particular television advertising.⁷¹

Watching television has become "the dominant pastime of youth throughout the industrialised world."⁷² Most of the \$12 billion per year deployed by corporations in promoting junk food to children is spent on television advertising.⁷³ Researchers estimate that children in the United States see between twenty thousand to forty thousand television commercials each year.⁷⁴ The vast majority of these advertisements are for fast food, soft drinks, sugared cereal, and candy.⁷⁵ The consensus among researchers, and the revealed opinion

69. See generally BRIAN L. WILCOX ET AL., REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON ADVERTISING AND CHILDREN (2004), <http://www.apa.org/pi/cyf/advertisingandchildren.pdf> (describing various ways advertisers target children).

70. *Id.* at 9 ("Nearly all research on advertising to children involves studies of television, leaving us with little empirical knowledge about other commercial forms and contexts.").

71. *Id.* The question of what constitutes advertising "directed at children," as distinct from advertising "directed at adults," is an important—and, I argue, vexing—question when it comes to the constitutional analysis of any ban that purports to forbid junk-food advertising to children but not to adults. For present purposes, however, the question may be held in abeyance and it will serve to follow the path broken by social scientists who have simply focused on the effects of advertising obviously directed at children. See, e.g., Krista Kotz & Mary Story, *Food Advertisements During Children's Saturday Morning Television Programming: Are They Consistent with Dietary Recommendations?*, 94 J. AM. DIETETIC ASS'N 1296, 1296–1300 (1994) (analyzing the content of food advertisements during television programming aimed specifically at children).

72. David S. Ludwig & Steven L. Gortmaker, *Programming Obesity in Children*, 364 LANCET 226 (2004) (collecting studies analyzing the relationship between television advertising and obesity in children).

73. WILCOX ET AL., *supra* note 69, at 20.

74. Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the U.S.*, 1 INT'L J. OF BEHAV. NUTRITION & PHYSICAL ACTIVITY 3 (2004). Children in low-income families have a higher exposure to food advertising because they tend to spend more time watching television than do their more affluent counterparts. *Id.*

75. E. Katherine Battle & Kelly D. Brownell, *Confronting a Rising Tide of*

of profit-oriented market actors, is that television advertising contributes substantially to the heavy consumption of junk food on the part of children.⁷⁶

It is important to appreciate that television advertising contributes to childhood obesity in multiple ways. Perhaps most importantly, junk-food advertising alters children's diets by inducing preferences for junk-food consumption.⁷⁷ Additionally, junk-food advertising contributes substantially to sedentary habits in children, which contribute to weight gain.⁷⁸ Advertising pays for the programming that draws children to the couch and away from more physically strenuous activity, so that they will be sitting more-or-less still when the programming is interrupted with advertising. Thus, television programs aimed at children are essentially advertisements for advertisements. That is the sense, undoubtedly, in which

Eating Disorders and Obesity: Treatment vs. Prevention and Policy, 21 ADDICTIVE BEHAVS. 755, 761 (1996).

76. See Ludwig & Gortmaker, *supra* note 72. Though far out of the mainstream in this area, a few scholars have argued that food advertising has no adverse effect on children, and possibly serves useful purposes, and therefore should not be targeted for regulation in an effort to curb the obesity epidemic among children. See Todd J. Zywicki et al., *Obesity and Advertising Policy* 52 (George Mason Sch. of Law Working Paper Series, Paper No. 3, 2004), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1002&context=gmulwps>.

77. See Dina L. G. Borzekowski & Thomas N. Robinson, *The 30-Second Effect: An Experiment Revealing the Impact of Television Commercials on Food Preferences of Preschoolers*, 101 J. AM. DIETETIC ASS'N 42, 42-46 (2001) (showing that exposure to a 30-second food advertisement during the course of a TV program changed food preferences in preschool children); *id.* at 42 (finding that in the two weeks following watching particular television advertising, 67% of Latino preschool subjects asked to be taken to the particular restaurant or store shown in the commercials and 55% requested a featured food or drink). Of course, children are often fed by their parents. However, this has not stopped corporations from marketing junk food products directly to children, as marketers have extensively studied the power of advertising to induce children to "nag" their parents incessantly to feed them the advertised junk food. See *Broken Scales*, *supra* note 3, at 1705-07. Children's direct purchasing power has also increased substantially in recent decades, such that children often purchase and consume junk food without parental intervention. One study estimated that children fourteen years old and younger are directly responsible for \$24 billion in purchases annually, and influence over \$190 billion in family purchases annually. WILCOX ET AL., *supra* note 69, at 20-21.

78. See ASSOCIATED PRESS, POLL: LACK OF EXERCISE BLAMED FOR KID OBESITY, available at <http://msnbc.com/id/9812095/>.

children's programming is understood by the food industry.⁷⁹ Studies also show that children, like adults, often eat while watching television, food that would likely not be consumed were they engaged in some other activity.⁸⁰

Just how does exposure to junk-food advertising lead to the consumption of junk food by children? The process is somewhat opaque. What is clear, however, is that the process does *not* resemble the stylized picture of a rational actor gathering and responding to information about the availability and price of a good for which the actor has a pre-existing preference.⁸¹ The findings in this area are much more consistent with a situational character-type conception of agency and consumer behavior.⁸² As a recent commission report of the American Psychological Association summarized:

Commercials are highly effective at employing production conventions, or formal features, to attract children's attention, such as unique sound effects and auditory changes, rapidly moving images, and audiovisual gimmicks and special effects.

... [A]dvertising to children avoids any appeal to the rational, emphasizing instead that ads are entertainment and 'enjoyable for their own sake,' as opposed to providing any real consumer information. The most common persuasive strategy employed in advertising to children is to associate the product with fun and happiness, rather than to provide any factual product-related information. For example, a commercial featuring Ronald McDonald dancing, singing, and smiling in McDonald's restaurants without any mention of the actual food products available reflects a fun/happiness theme. This strategy is also found frequently

79. Thus, the junk-food industry's claim that it is sedentary lifestyles, rather than food consumption habits, that is responsible for childhood obesity would not, even if it were true, absolve the industry of responsibility for the epidemic. See *Broken Scales*, *supra* note 3 at 1727–68 (reviewing industry arguments).

80. See Ludwig & Gortmaker, *supra* note 72.

81. See Hanson & Yosifon, *The Situation*, *supra* note 21, at 154–60 (reviewing presumptions underlying conventional conceptions of human behavior, with particular reference to the rational actor model in law and economics).

82. See *id.* at 154–60, 265.

with cereal ads, which often include spokes-characters (e.g., Tony the Tiger, Cap'n Crunch) to help children identify the product. In contrast, most commercials fail to mention even the major grain used in each cereal⁸³

Some researchers have argued that junk-food advertising makes use of deeply ingrained information-transmitting cues through which human young have, from time immemorial, learned what foods are beneficial to eat, and which are to be avoided: "[T]he themes emphasized in television advertisements for foods appear to be providing information that once served as a signal of nutritional value."⁸⁴ Such cues, which have been shown to be influential in the development of eating habits in other mammals, involve themes such as food being fought over, or the consumption of a food item being accompanied by exaggerated visible signs of enjoyment, as well as of health and vitality generally.⁸⁵ When children respond to such cues and consume the advertised foods, they encounter foods that are filled with salt, sugar, and fat, precisely the kinds of highly caloric foods our evolutionarily betrothed eating systems are oriented towards consuming in large amounts when they are available.⁸⁶ Unfortunately, such foods, which were available only intermittently in the natural conditions under which our eating systems evolved, are today made ubiquitously available to children by the food industry, not just in grocery stores, but in schools, shopping centers, gasoline stations, and any other place corporations can reach.⁸⁷

Much of the research in this area has focused on tracking children's own conscious understanding of the advertisements they see. Such studies have established that "young children have little understanding of the persuasive intent of advertising."⁸⁸ Children begin to understand advertising intent around the age of seven or eight. Preteens, this research suggests, "possess the cognitive ability

83. WILCOX ET AL., *supra* note 69, at 23–24 (citation omitted).

84. Trenton G. Smith, *The McDonald's Equilibrium: Advertising, Empty Calories, and the Endogenous Determination of Dietary Preferences*, 23 SOC. CHOICE & WELFARE 383, 404 (2004).

85. *See id.*

86. *See id.* at 405–06.

87. *See Broken Scales*, *supra* note 3 at 1675–89 (describing "The Interior Situation of the Human Eating System," with special reference to evolutionary biology).

88. Story & French, *supra* note 74, at 3.

to process advertisements but do not necessarily do so."⁸⁹ These findings, to be sure, provide important evidence of the unseen influence of junk-food advertising on children. But the importance of such findings to the overall analytic project underway in this article should not be overstated. Even though adults may recognize the persuasive intent of advertisements, that does not mean that the advertisements do not influence adults in ways they do not appreciate. Indeed, advertising's powerful grip on adults is bolstered by the irony that most adults believe advertising probably manipulates other consumers, but not themselves.⁹⁰ While it is cause for concern that children do not recognize the persuasive intent of junk-food advertising, the recognition of such intent is hardly conclusive with respect to the unseen power of advertising to manipulate consumer behavior.

C. The Inadequacy of the Present Regulatory Framework

In light of the foregoing, it may come as a surprise to learn that junk-food advertising, even junk-food advertising directed at children, is almost entirely unregulated. The following sections will describe important aspects of the regulations that do exist, with emphasis given to the regime established by the Federal Trade Commission (FTC), the principle federal agency concerned with regulating advertising. Many state-based regulatory efforts are modeled on the FTC's approach, which is itself built on a general framework derived from familiar common law principles.⁹¹ I will argue that the FTC-type approach is grossly inadequate to the task of soundly regulating junk-food advertising, in large measure because of the strong dispositionist presumptions that the framework employs. I explore this argument through an examination of the legal concept of "puffery," and the central part that doctrines such as "puffery" play in insulating the pernicious effects of junk-food advertising from the reach of extant statutory and common law regulation.

89. *Id.*

90. See Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 228.

91. See *infra* text accompanying notes 122–133.

1. The Basic FTC Framework

Established in 1914 as a centerpiece of the Roosevelt administration's antitrust legislation, the FTC is one of the oldest administrative agencies of the federal government.⁹² The agency's enabling legislation gave it the power to prohibit "unfair methods of competition,"⁹³ but initially contained no specific reference to protecting consumers against deceptive trade practices.⁹⁴ Agency administrators, however, soon came to see consumer deception as an important form of unfair competition. A company that deceives customers, the FTC reasoned, competed unfairly against a competitor that does not.⁹⁵ With the courts divided over whether consumer deception was within the ambit of the agency's regulatory power, Congress in 1938 stepped in and formally granted the FTC the power to prohibit "deceptive acts or practices."⁹⁶ The same legislation specifically empowered the FTC to regulate food advertising.⁹⁷

Despite its mandate officially expanding throughout the 1940s and 1950s, the agency, by the end of the 1960s, came under withering criticism from both consumer groups and legal scholars as being inept, polluted by patronage, and captured by industry influence.⁹⁸ In the 1970s the agency enjoyed a brief period of resurgence, in part as a result of internal reforms adopted in response

92. MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 8:2 (2004).

93. *Id.*

94. *See, e.g.*, FTC v. Radam Co., 283 U.S. 643 (1931); FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922); Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919).

95. PRIDGEN, *supra* note 92, at § 8:2.

96. Federal Trade Commission Act § 5(a), Pub. L. No. 447, 52 Stat. 111 (1938). For a detailed legislative history of the Wheeler-Lea Amendment, see EARL KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4807-46 (Chelsea House Publishers 1982) (1978).

97. KINTNER, *supra* note 96, at 4812. The FTC regulates food advertising, while the Food and Drug Administration (FDA) is responsible for food labeling. *See* Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. (CCH) ¶ 9851 (1971).

98. *See, e.g.*, EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969) (examining the failures of the FTC in their management of resources and funds); Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

to the criticism it had sustained in the preceding decade.⁹⁹ At perhaps the zenith of this surge, the FTC in the late 1970s undertook to ban advertising directed at children altogether.¹⁰⁰

The FTC staff report that proposed such a ban drew heavily on social scientific study of the influence of advertising on the consumption behavior of children, some of which was summarized above.¹⁰¹ The report argued that the cognitive immaturity of children made advertising directed at them inherently deceptive:

[C]hildren are at the opposite pole, psychologically, intellectually and economically, from the traditionally assumed 'rational consumer' for whom advertising provides a service, by offering him or her information relevant to logical market behavior. Children too young to understand even the concept of a market in which products compete are also too young to understand that a decision to consume any product may imply a decision not to consumer some other product, or to forgo some other benefit. The classical justification for a free market, and for the advertising that goes with it, assumes at least a rough balance of information, sophistication and power between buyer and seller. . . . [I]t is ludicrous to suggest that any such balance exists between an advertiser who is willing to spend many thousands of dollars for a single 30-second spot, and a child who is incapable of understanding that the spot has a selling intent, and instead trustingly believes that the spot merely provides advice about one of the good things in life.¹⁰²

Intense Congressional lobbying by the food industry succeeded in scuttling the FTC proposal.¹⁰³ Congress, which has a history of withholding funds from the FTC when it disapproves of the agency's

99. See PRIDGEN, *supra* note 92, § 8:2.

100. See ELLIS M. RATNER ET AL., FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 10-11 (1978). The report itself is based on more than 60,000 pages of testimony on the issue of commercial advertising to children. *Id.*

101. See *id.*; see also *supra* Part II.D.

102. RATNER ET AL., *supra* note 100, at 28-29. Interestingly, childhood obesity was not yet a major problem in the 1970s; the major health problem that the FTC identified in connection with junk-food advertising to children was tooth decay. See *id.* at 119-41.

103. See Story & French, *supra* note 74, at 12-13.

actions, refused the FTC funds to so much as hold a hearing on its proposal.¹⁰⁴ And just in case the FTC failed to get the message, Congress passed the FTC Improvements Act of 1980, which "specifically prohibited any further action to adopt the proposed children's advertising rules,"¹⁰⁵ and imposed on the agency "a three-year moratorium on the promulgation of rules against unfair advertising."¹⁰⁶ Perhaps even more importantly, Congress also forbade the FTC from imposing industry-wide regulations regarding deceptive advertising practices in 1980, requiring the agency instead to make determinations on a case-by-case basis.¹⁰⁷ This prohibition lasted until legislation re-authorizing the FTC as a federal agency removed the restriction in 1993.¹⁰⁸ In 1990, Congress passed the Children's Television Act,¹⁰⁹ which required the FTC to promulgate regulations that "limit[ed] the amount of commercial time during children's programming to 10.5 [minutes per hour] on weekends and 12 [minutes per hour] on weekdays."¹¹⁰ These restrictions remain in place.¹¹¹

The FTC has today adopted a "partnership" model of regulating advertising to children, purporting to work co-operatively with industry to advance its mission of preventing deceptive advertising. In July of 2005, responding to the growing visibility of the childhood

104. The FTC enabling legislation formerly contained a provision allowing Congress to veto any regulatory act with which it disagreed; however, the United States Supreme Court deemed the provision unconstitutional. *See* *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983). *See generally* *INS v. Chadha*, 462 U.S. 919 (1983) (holding legislative vetoes unconstitutional on separation-of-powers grounds).

105. Story & French, *supra* note 74, at 13.

106. PRIDGEN, *supra* note 92, § 8:2, *see also* 15 U.S.C. § 57a-1 (1982) (providing Congress with final review of rules promulgated by the FTC). The congressional response to the proposed regulations was no doubt one part capture and one part deep capture. *Cf. Broken Scales*, *supra* note 3, at 1724–26 (examining the conjunction of capture and deep capture in legislative proposals to halt tort suits against the fast food industry for consumer harms).

107. 15 U.S.C. § 57(a)(i).

108. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691, 1695.

109. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified as amended at 47 U.S.C. §§ 303(a), 303(b), 394 (2000)).

110. Story & French, *supra* note 74, at 12 tbl.6.

111. *See id.*

obesity epidemic,¹¹² the FTC held a "public workshop" on the issue in Washington, D.C. Reflecting its partnership approach, the agency titled the workshop "Marketing, Self-Regulation, and Childhood Obesity."¹¹³ The workshop served to highlight the FTC's present regulatory appetite, or lack thereof, for regulating junk-food advertising. The emphasis of the workshop was "on industry self-regulatory efforts, and . . . recent initiatives by individual companies to respond to childhood obesity through changes in their products or their marketing efforts."¹¹⁴ Prior to the workshop, FTC Chair Deborah Platt Majoras released remarks stating: "I want to be clear that, from the FTC's perspective, this is not the first step toward new government regulations to ban or restrict children's food advertising and marketing. The FTC tried that approach in the 1970s, and it failed for good reasons."¹¹⁵

2. The Problem with the Present Regulatory Approach

Because Congress prohibited the FTC from developing a general ban on advertising to children,¹¹⁶ the regulation of such advertising has been left to the FTC's general power to regulate deceptive advertising on a case-by-case basis. Although the case-by-case review method is vulnerable to criticism from a number of programmatic and theoretical perspectives, I will focus here on the profound inadequacy of the *standard* that the FTC employs in cases where it does act.

112. In the last several years, public health advocates, scholars, filmmakers, and the media have paid increasing attention to the obesity crisis. *See Broken Scales*, *supra* note 3, at 1746–56 (discussing the movie "Supersize Me" and media response to it).

113. Deborah Platt Majoras, Chairman, Obesity Liability Conference 8 (May 11, 2005) (on file with author). The workshop was co-sponsored by the Department of Health and Human Services. *Id.*

114. Majoras, *supra* note 113, at 8.

115. *Id.* Majoras continued:

I would like to emphasize the potential for advertising to be a positive force in this area. I am sure that no one in this room doubts the power of advertising to shape consumer demand and choices. Similarly, the FTC is a big believer in advertising as a promoter of competition in our free market society.

Id.

116. *See supra* text accompanying notes 104–111.

In response to congressional inquiry, the FTC in 1983 produced a "Policy Statement on Deception" (hereinafter, the "Deception Statement"), which purported to articulate the industry's views on the concept of deception so as "to provide a concrete indication of the manner in which the Commission [would] enforce its deception mandate."¹¹⁷ The Deception Statement brought together standards developed during the FTC's decades long enforcement record, and the statement has, since 1983, served as the central analytic guidepost in subsequent agency actions.¹¹⁸ According to the Deception Statement, for an advertisement, or any trade practice, to be "deceptive" within the meaning of Section 5 of the FTC Act, "there must be a representation, omission or practice that is likely to mislead the consumer."¹¹⁹ Importantly, a misleading statement only constitutes deception if it is "material,"¹²⁰ that is, if it is "likely to affect the consumer's conduct or decision with regard to a product or service."¹²¹ Reflecting the common law standards on which it is based, the Deception Statement purports to modulate its standard based on the intended target of an advertisement: "When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group."¹²²

The fundamental inadequacy of the FTC approach, and similar state law approaches to advertising regulation, is their misguided adherence to common law, and common sense, notions of what is "likely to affect consumer[] conduct."¹²³ To appreciate how, consider the operation of a central legal concept in both FTC and common law jurisprudence: the doctrine of "puffery."

117. Letter from James C. Miller, III, Chairman of the FTC, to John D. Dingell, Chairman of the Comm. on Energy & Commerce, U.S. House of Representatives (Oct. 14, 1983), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

118. The 1993 FTC reauthorization act gave legislative imprimatur to the view of deception expressed in the Letter from James C. Miller, III., to John D. Dingell, *supra* note 118, *See* PRIDGEN, *supra* note 92, at § 8:2.

119. Letter from James C. Miller, III., to John D. Dingell, *supra* note 117.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

"Puffery" refers to a nebulous but broad category of hyperbole and bluster that in the eyes of the law does not constitute false or misleading advertising because "no reasonable consumer relies upon it."¹²⁴ For example, advertising stating that a pasta manufacturer's product was "America's Favorite Pasta," was un-actionable puffery, despite the fact that there was no evidence that the pasta was, in fact, America's favorite.¹²⁵ By operation of the doctrine, a pizza company promoting its product as comprising "Better Ingredients. Better Pizza," even when compared to other pizza brands, could not be made to answer for a cause of action based in consumer deception.¹²⁶ A video game company promoting its product as "the most advanced home-gaming system in the universe," even though other systems were more advanced, could not be made to answer for a claim based on misleading consumers.¹²⁷ More generally, advertising which associates a particular product with exaggerated excitement, health and vitality, fun, and happiness is considered puffery, and therefore irrelevant to consumer deception concerns.¹²⁸ A classic explanation of the doctrine comes, as usual, from Judge Learned Hand:

There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we

124. Rodney A. Smolla, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1279 n.12. (2004) (defining puffery).

125. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391–92 (8th Cir. 2004).

126. *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 498–99 (5th Cir. 2000).

127. *Atari Corp. v. 3DO Co.*, No. C 94-20298 RMW (EAI), 1994 WL 723601 (N.D. Cal., May 16 1994).

128. *See, e.g., Goodwin v. Anheuser-Busch Cos., Inc.*, 2005 WL 280330 (Cal. Super. Ct. 2005) ("[P]laintiffs do not identify any advertising that is misleading or false. Instead the plaintiffs focus on puffery or on qualities that are not affirmations of fact such as the fun, sexiness, popularity, social acceptance, athleticism, etc. that drinking alcohol can bring. This is not actionable . . ."). Professor Ivan L. Preston identifies several different categories of advertising claims that are considered un-actionable as a matter of law, including "puffery," "obviously false claims," and "lifestyle claims," which he refers to collectively as "loophole claims." *See* Ivan L. Preston, *Puffery and Other "Loophole" Claims: How the Law's 'Don't Ask, Don't Tell' Policy Condone Fraudulent Falsity in Advertising*, 18 J.L. & COM. 49, 54–74 (1998). I make use of Preston's excellent analysis *infra* text accompanying notes 133–141, but I maintain the convention of referring broadly to all such "loophole claims" as "puffery."

were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it.¹²⁹

The FTC embraces the puffery doctrine:

Certain practices . . . are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion. . . .

The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously.¹³⁰ While both the FTC and the common law purport to evaluate the deceptiveness of advertising from the perspective of its target audience,¹³¹ the doctrine of puffery appears to be no less expansively applied to advertising directed at children as it is to advertising generally.¹³²

Despite its familiarity and force, the doctrine of puffery, is shabbily under-theorized. Commentators have found the doctrine to be highly problematic, both analytically and empirically.¹³³ The idea that statements constituting puffery do not influence consumer behavior or decision-making is given the lie by the fact that a

129. *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918); *see also* *Cook, Perkiss & Liehe Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (“Puffing has been described by most courts as involving outrageous statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers.”).

130. Letter from James C. Miller, III., to John D. Dingell, *supra* note 117.

131. *See id.*

132. *See, e.g.,* *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 530 (S.D.N.Y. 2003) (“In any case, if plaintiffs are only concerned about the appellation ‘Mightier Kids Meal,’ such [a] name is seemingly mere puffery, rather than any claim that children who eat a ‘Mightier Kids Meal’ will become mightier.”).

133. Jean W. Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 835, 846–73 (1999) (finding courts inconsistently define “puffery”); Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexis*, 94 TRADEMARK REP. 585 (2004) (examining the puffery doctrine). *See generally* Preston, *supra* note 128 (analyzing the court’s historical treatment of puffery and its subsequent evolution into loophole claims allowed by the FTC).

substantial proportion of contemporary advertising consists of nothing *but* puffery. If puffery were as inconsequential as the puffery doctrine holds it to be, then profit-maximizing corporations would not engage in it—firms that wasted money on it would be quickly subsumed by those that did not. And, sure enough, empirical evidence reveals that advertising conventionally categorized as "puffery" does indeed influence the behavior of ordinary consumers, epigrammatic protestations to the contrary by Judge Hand notwithstanding.¹³⁴

Ivan L. Preston has studied the FTC's advertising review process extensively and argues that uncritical acceptance of the puffery doctrine has seriously undermined the agency's effectiveness:

[FTC practice] does not fully reflect the FTC's policy statements on puffery, which define the concept as claims consumers see as meaningless, thus impliedly requiring determination of the latter. . . . Staff practice, however, does not involve investigation into consumer response; rather, it appears to involve only examination of the words, followed by decisions that claims having semantic forms previously ruled to be puffery, are puffery. If the claim is puffery semantically and is unaccompanied by questionable fact claims, it is virtually assumed automatically at the investigation stage to be meaningless and, thus, to be puffery in fact . . . leading to the conclusion again and again that consumers understand these claims as meaningless and so cannot be deceived.¹³⁵

From the critical realist perspective, one would anticipate that consumers would be susceptible to influence through advertising practices that dispositionist presumptions would lead us to consider innocuous, but which market practices suggest is efficacious. And this is in fact what social scientific study of "mere puffery" has found. Indeed, "no behavioral studies have reported the finding, assumed by the law, that consumers typically see puffery and other loophole claims as meaningless."¹³⁶ One empirical study of

134. See Preston, *supra* note 128.

135. *Id.* at 62.

136. *Id.* at 82–83; see also Bruce G. Vanden Bergh & Leonard N. Reid, *Effects of Product Puffery on Response to Print Advertisements*, 1980 CURRENT ISSUES & RES. ADVERTISING, 123; Bruce G. Vanden Bergh &

consumer thinking, for example,

surveyed a sample of citizens on whether they felt various advertising claims were "completely true," "partly true," or "not true at all." The puffery claims among them were rated as follows: "State Farm is all you need to know about life insurance" (22 percent said completely true, 36 percent said partly true); "The world's most experienced airline" (Pan Am) (23 percent and 47 percent respectively); "Ford has a better idea" (26 percent and 42 percent); "You can trust your car to the man who wears the star" (Texaco) (21 percent and 47 percent); "It's the real thing" (Coca-Cola) (35 percent and 29 percent); "Perfect rice everytime" (Minute Rice) (43 percent and 30 percent) . . . Alcoa's claim, "Today, aluminum is something else," [was] appraised as completely true by 47 percent and partly true by 36 percent.¹³⁷

Each of these statements is posed in a form that would be captured by the puffery doctrine. As Preston concluded, "[h]ad people responded as the law assumes, they would all have answered 'not true at all.'"¹³⁸ Note that the study quoted above was conducted not by academics, but by advertising experts seeking to understand what was and was not working in the advertising they produced.¹³⁹ Through such inquiry, market actors have developed a much clearer understanding of what influences consumers than the law does, which continues to view "mere puffery" through the lens of intuition and common sense.¹⁴⁰

Leonard N. Reid, *Puffery and Magazine Ad Readership*, 44 J. MARKETING 78 (1980) (finding consumers do not necessarily consider puffery meaningless); Morris B. Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude*, 15 J. MARKETING RES. 545 (1978); Jerry C. Olson & Philip A. Dover, *Cognitive Effects of Deceptive Advertising*, 15 J. MARKETING RES. 29 (1978); Herbert J. Rotfeld & Kim B. Rotzoll, *Is Advertising Puffery Believed?*, 9 J. ADVERTISING 16, 18 (1980).

137. Preston, *supra* note 128, at 80–81 (citing *Consumer Confidence-Signs of an Upturn*, BRUSKIN REPORT (R.H. Bruskin Associates, New Brunswick, N.J.), May 1971, at 2).

138. *Id.*

139. *See id.*

140. Another interesting study suggests that "puffery" may even meaningfully influence consumer behavior where the "meaningless" nature of the puffery in a given advertisement is highlighted. *Id.* at 83. After surveyed

The enormous spending on "puffery" would be an enormous waste of corporate resources if these types of advertisements were as meaningless as the law presumes. Nevertheless, when challenged, corporations are quick to raise the puffery *defense* in their motions and briefs. Because of the power of the puffery doctrine to repel scrutiny of the real power of much advertising, it is difficult to find evidence beyond corporate practice alone evidencing corporate understanding of just how manipulative puffing can be over consumer behavior. However, corporate submissions to the FTC's recent workshop on the childhood obesity epidemic ironically provides revealing evidence of the fact that corporations are capable, and know they are capable, of influencing consumption through puffing.¹⁴¹

General Mills, Inc., in a written submission to the workshop, endeavored to explain that it has responded responsibly to the childhood obesity epidemic, in part, by marketing healthier foods to children (thus, General Mills concluded, no further regulation by the FTC was necessary).¹⁴² For present purposes, what is important about General Mill's argument is its admission concerning the power of puffing. In a section titled "Yogurt consumption by kids—*how General Mills accelerated kid adoption of a healthful product by marketing the concept of fun (and not particular health benefits)*

consumers were informed that certain advertised product attributes were meaningless—for example, that "flaked crystals" were irrelevant to the brew quality of instant coffee—consumer preferences nevertheless continued to be shaped favorably by the presence of such irrelevant information. *Id.* That is, consumers who were first exposed to advertisements promoting a coffee product having "flaked crystals" and were then told that "flaked crystals" are irrelevant to the quality of coffee, still had a greater preference for the coffee than did consumers who were exposed to ads that did not portray the coffee as having "flaked crystals" at all. *Id.* Information that was meaningless, therefore, influenced consumer behavior even after they were alerted to its meaninglessness. *Id.* The FTC and most common law courts, however, would begin and end with the legal conclusion that such meaningless statements had no effect on consumer behavior. *See id.* at 84.

141. *See supra* text accompanying notes 113–115 (discussing FTC chairperson's comments in conjunction with the workshop).

142. Letter from Kendall J. Powell, Executive Vice President and Chief Operating Officer, General Mills, to Donald S. Clark, Sec'y, Fed. Trade Comm'n, General Mills Submission to FTC Obesity Conference (June 8, 2005), *available at* <http://www.ftc.gov/os/comments/FoodMarketingtoKids/516960-00028.pdf>.

directly to kids,"¹⁴³ General Mills wrote:

Not too many years ago, American kids did not eat much yogurt. General Mills set out to change that—not by directly telling kids that eating yogurt would be better for them than other common snack foods (like cookies and candy) . . . but by making yogurt fun and appealing.

Among other important initiatives to encourage this, we introduced Go-Gurt (a squeezable tube of yogurt suitable for snacking on the go) and Trix yogurt (a conventional cup yogurt branded in an appealing way), and supported these products with appealing advertising emphasizing an association between fun and yogurt. Adoption of these products by kids in response to the marketing has been impressive. In a 2005 survey of kids who consume yogurt, 76% said they like Go-Gurt and 74% said they like Trix, on par with the liking scores of longstanding and dominant products like Popsicles (77%) and Oreos (74%). . . .

Thus, effective marketing of these kid-oriented yogurt products has essentially created a product category that did not formerly exist, encouraging kids to more often choose nutrient-dense yogurt as a healthful snack, providing kids with calcium and protein without much sodium or fat.¹⁴⁴

General Mills is here trumpeting the ease with which it was able to induce children's consumption of yogurt by advertising methods that are, in consumer protection doctrine, non-influential as a matter of law. Because it can exercise this power, General Mills argues, any expansion of the FTC's regulation of junk-food advertising to children is unnecessary. Surely the opposite conclusion is more logical—namely that puffery is powerful, and that the conventional regulatory framework, which does not regulate it, is inadequate.

General Mills has clearly engaged in extensive empirical study of how to puff effectively. The statistics cited above are referenced by a footnote to a study called the "General Mills Attitude and Usage Study, February 2003,"¹⁴⁵ which indicates that General Mills is engaging in precisely the kind of social scientific study that has

143. *Id.* at 3 (emphasis added).

144. *Id.* at 3–4.

145. *Id.* at 3 n.5. The underlying study is not publicly available.

among academic social scientists, though typically not legal scholars or jurists, revealed the power of puffing. Undoubtedly General Mills uses the same advertising tactics to promote foods that are far less healthy than yogurt, such as its "Lucky Charms" cereals. The "fun and appealing" antics of "Lucky the Leprechaun" no doubt influence consumer behavior in much the same way that General Mills's promotion of "Go-gurt" does, that is, by associating the product with "fun" and "magic," matters that are attractive to children.¹⁴⁶ Yet the connection between the "fun" and the product is dismissed as un-actionable "puffery" in the eyes of the law.¹⁴⁷

"Puffery" is a legal doctrine that rests on a demonstrably false conception of human thinking and decision-making. It is dispositionist dogma, steeped in intuition and devoid of any social scientific justification. Far from being a quaint or marginal doctrine, puffery reflects an abiding ignorance, at the heart of contemporary consumer protection law, of unconscious psychological processes, and non-obvious influences on human behavior. What the law does not appreciate, and what it must grapple with for an effective remedy to the problem of junk-food advertising to children to be fashioned, is that advertising influences consumers in ways that common sense—both of the consumer and the regulator—is not likely to appreciate. Junk-food advertising, ubiquitously deployed by profit-seeking corporations, associating fun, magic, health and vitality with junk-food consumption, for example, may mislead people with respect to their perception and conception of the health consequences of frequent junk-food consumption, in ways common sense fails to see.¹⁴⁸ Many advertising methods and themes used to sell junk food,

146. See General Mills, Home Page, <http://www.generalmills.com/corporate/index.aspx> (last visited July 22, 2005); Lucky Charms Magical Realm, <http://www.luckycharmsfun.millsberry.com/> (last visited July 22, 2005).

147. *Connick v. Suzuki Motor Co.*, 656 N.E.2d 170, 183 (Ill. App. Ct. 1995) (describing representations of a "funmobile," with "fun written all over it" as non-actionable puffery), *overruled on other grounds by* *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584 (Ill. 1996).

148. The manipulation of consumer risk perception is just one way that junk-food advertising can mislead consumers. As discussed earlier, some researchers argue that junk-food advertising exploits signaling cues that have guided human eating patterns—and those of our fellow mammals—for many thousands of years, long before the emergence of civilization. See *supra* text accompanying notes 54–60. Junk food advertising that deploys these cues may give shape to eating habits that are debilitating, by misleading ancient

that are viewed as unproblematic through the traditional normative lens, may actually be very problematic.¹⁴⁹

D. A Proposal to Ban Junk-Food Advertising to Children

In light of the foregoing, it seems that a fairly dramatic overhaul of the present regulatory approach may be needed to stem the tide of the childhood obesity epidemic. I propose that one innovative response to the problem would be to implement a near total ban on junk-food advertising to children.¹⁵⁰

One approach to such a ban would be to target only junk-food advertising directed solely at children, or methods that appeal solely to children, and exempt advertising to adults. Such a ban, however, would only capture a very narrow category of advertising, if any at all. Adults are nearly always present in communicative venues where children are present, and communicative occasions where *only* adults are allowed are very limited. Thus, any effective effort to insulate children from junk-food advertising would necessarily effectuate a substantial limitation on the advertising of junk food to adults. A ban on junk-food advertising to children must therefore be conceived of, programmatically and analytically, as a near total ban on junk-food advertising to adults, as well as to children. As will be

cues oriented towards signaling eating habits that would aid human thriving.

149. Calling something “misleading” is ultimately a legal conclusion, just as assigning “causation” is, in the end, a legal conclusion. Legal economists, for example, were interested in observing—and imposing—efficiency in legal rules, and so for them “causation” in, say, a torts context would be located where necessary to make the least cost avoider of harm take the appropriate precautions. See Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L. REV. 433, 504–05 (1995). The critical realist also attempts to locate—and install—her legal theoretic preoccupations in actual and proposed law. Pre-occupied with the analytic problem of unseen situational influence and manipulation, the critical realist addresses these inquiries to the legal conception of “misleading” speech, and calls misleading those unseen influences, particularly where they operate to people’s obvious detriment.

150. For other innovative approaches to regulating junk-food advertising, see Valere Byrd Fulwider, *Future Benefits? Tax Policy, Advertising, and the Epidemic of Obesity in Children*, 20 J. CONTEMP. HEALTH L. & POL’Y 217 (2003) (proposing changes to the tax treatment of advertising campaigns directed at children); see also Mona L. Hymel, *Consumerism, Advertising, and the Role of Tax Policy*, 20 VA. TAX REV. 348 (2000) (analyzing the influence of tax policy on advertising practices and proposing reforms).

discussed *infra*, that is, in any event, how the Supreme Court would likely approach its review of such a ban.¹⁵¹

A near total ban is necessary, I assert, because the case-by-case adjudication of false or misleading advertising in which the FTC, state agencies, and common law courts are presently involved, is hopelessly inadequate to the enormity of the problem. The case-by-case method, institutionally, can never keep track of every advertisement that is potentially misleading to consumers. Neither can consumers themselves keep track of, and bring complaint against, the avalanche of misleading junk-food advertising they confront on television, radio, billboards, print periodicals, the Internet, or as product placements within entertainment programming, music, video games, and even live theater.¹⁵²

Nor would it suffice to ban in piecemeal fashion specific types or methods of advertising, such as the use of cartoon characters in the selling of junk food. Such limitations would no doubt be helpful—and my argument for the constitutionality of a near total ban could certainly be applied to resolve constitutional apprehensions about such regulation.¹⁵³ But the problem with such an

151. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001), for example, the Court found that limitations on billboard advertising of tobacco products “to children” impinged substantially on the advertising of such products to adults, and thus analyzed the ban in terms of its impact on the First Amendment interests of adults. *See infra* text accompanying notes 232–239 discussing this aspect of *Lorillard*). Certainly there are ways of conceiving of a narrow ban that might not substantially infringe on the promotion of junk food to adults, such as banning junk-food advertising in television programming which has an audience comprised overwhelmingly, or substantially, of children—while allowing junk-food advertising in all other television programming. Such a ban would perhaps be shown greater deference as far as constitutional standards are concerned, *see infra* text accompanying notes 234–236, but programmatically, in light of the ubiquity of junk-food advertising in our society in so many places frequented by both children and adults, such a ban would undoubtedly be far less effective than the near total ban that I propose and analyze here.

152. *See* Joe Mandese, *Paid Product Placement Surges in Magazines, Newspapers, Other Media*, MEDIA DAILY NEWS, July 26, 2005, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=32440.

153. *See infra* Part III. *But see* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 627–28 (1996) (arguing that a ban on the use of cartoon characters such as “Joe Camel” in tobacco advertising would be incompatible with the First Amendment).

approach is that marketing departments of profit-driven corporations will always stride several steps ahead of such piecemeal regulatory practice, as market forces compel the most capable corporations continually to discover mechanisms of misleading advertising that have yet to be discerned by the government. There are numerous ways for marketers to manipulate children's consumption behavior, and their thinking about their behavior, in *unseen ways*. Indeed, market forces will drive corporations to discover and exploit such methods even where corporate managers have not consciously endeavored to do so, as the discussion of puffery demonstrated.¹⁵⁴

Finally, a federal, legislative ban on junk-food advertising obviates the need to tangle with thorny common law issues such as "proximate cause," which would have to be satisfied were a remedy to this problem sought through innovative causes of action styled in tort. It is not suggested or proved here that junk-food advertising is the sole "cause" of childhood obesity—but no such proof is needed to justify the regulation of junk-food advertising, the pernicious effect of which is clear.¹⁵⁵

Thus, I propose a near total ban on junk-food advertising, which I call the "tombstone blues."¹⁵⁶ The basic features of this proposal are discussed in greater detail in Part III.B.3, following an explanation of the constitutional standard that any such ban must satisfy. In short, I envision a regulatory regime in which junk-food

154. See *supra* Part II.C.2.

155. Piecemeal litigation incorporating the insights described here, and elsewhere, may nevertheless be possible, but the development of such an approach is already being forestalled by legislative efforts at the state and federal levels to insulate food companies from lawsuits in connection with the obesity epidemic. See *Broken Scales*, *supra* note 3, at 1772–74 (discussing federal legislative proposals to put an end to obesity-related lawsuits against fast food companies, including the Commonsense Consumption Act and the Personal Responsibility in Food Consumption Act); see also Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153 (2004) (reviewing the limited progress of obesity related lawsuits).

156. I use the term "tombstone" in order to connect my proposal to the "tombstone" advertising regime employed in the federal regulation of securities advertising, and because the term itself is evocative of the dire stakes at issue here. See *infra* Part III.B.3. The "blues" connection is merely slang shorthand for the ban proposed by the Article. The usage here is inspired by JACK KEROUAC, *MEXICO CITY BLUES* (1959) and BOB DYLAN, *Tombstone Blues*, on *HIGHWAY 61 REVISITED* (Columbia Records 1965).

advertising is limited to what is referred to under the federal securities advertising regulatory regime as "tombstone" formatting: plain letters, perhaps a simple picture, against a plain background, describing a limited, prescribed set of information regarding the advertised junk-food item.¹⁵⁷

My proposal is not entirely fanciful, nor is the analysis supporting it merely an academic exercise.¹⁵⁸ As discussed earlier, the FTC proposed banning all television advertising to children in the late-1970s.¹⁵⁹ Despite the fact that the FTC does not appear to have the appetite for it, Senator Tom Harkin (D-Iowa) proposed legislation in June 2004 that would broadly empower the FTC to restrict advertising of food and beverages to children, and which would ban junk-food advertising to children in schools altogether.¹⁶⁰

Further, other nations suffering their own childhood obesity crises have begun to respond, in part, by restricting junk-food advertising. Sweden, for example, has implemented a near total ban on any advertising directed at children under the age of twelve.¹⁶¹ Similarly, Canadian law purports to prohibit all advertising directed at children under thirteen.¹⁶² Other countries have less complete, but still significant, bans: Belgium bans all advertising during children's television programming, and Australia bans advertisements during

157. As I discuss further *infra* Part III.B.3, the tombstone blues proposal is not only modeled on the near total ban on securities advertising prescribed by federal regulations, it is advanced for similar reasons—in particular, the vulnerability of the consumer vis-à-vis the enormous power of the seller to mislead with respect to the offered item.

158. While it is not *merely* an academic exercise, it is, indeed, an academic exercise—one that I hope may prove useful to other projects evaluating the wisdom and plausibility of commercial speech regulation, irrespective of the programmatic conclusions drawn here.

159. *See supra* Part II.C.1.

160. Harkin's bill would, *inter alia*, allow:

the Federal Trade Commission to issue regulations that restrict the marketing or advertising of foods and beverages to children under the age of 18 years if the [FTC] determines that there is evidence that consumption of certain foods and beverages is detrimental to the health of children or it determines advertising to children to be unfair or deceptive.

S. 2558, 108th Cong. § 302 (as introduced to the Senate, June 22, 2004).

161. Story & French, *supra* note 74, at 13–14.

162. *See* Karla K. Gower, *Looking Northward: Canada's Approach to Commercial Expression*, 10 COMM. L. & POL'Y 29, 50 (2005); *see, e.g.*, Consumer Protection Act, R.S.Q., c. P-40.1, §§ 248, 249 (2005).

television programming directed at preschoolers.¹⁶³ While the constitutional analysis advanced in this Article does not directly join a discussion of the legal standing of these bans in foreign countries, their existence at least suggests that such an approach is not wholly inconsistent with democratic practices and values.

The next Part of this Article argues that, in the proper form, a junk-food advertising ban is both wise and constitutionally viable. It is hoped that this exegesis may contribute generally to a freshened understanding of the commercial speech doctrine, even if my application of the analysis to a proposed junk food advertising ban is unsatisfying to the reader.

III. THE CONSTITUTIONAL PERMISSIBILITY OF BANNING JUNK-FOOD ADVERTISING TO CHILDREN

A. *Dispositionism and the Modern Commercial Speech Doctrine*

I began my case for a junk-food advertising ban by citing to Justice Thomas's facetiously intended argument in *Lorillard*, a case in which the Court struck down on First Amendment grounds Massachusetts's attempt to regulate tobacco product advertising on billboards directed at children.¹⁶⁴ The holding in *Lorillard* should give pause to anyone who is sanguine about government's power to regulate junk-food advertising to children. Nevertheless, in what follows I argue that it need only give pause, and that neither *Lorillard*, nor other recent cases commonly seen as indicating that the Court is trending towards higher levels of scrutiny for commercial speech regulations,¹⁶⁵ preclude a junk-food advertising ban such as my tombstone blues proposal.

163. Story & French, *supra* note 74, at 14.

164. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 587–88 (2001). Although, the Court also held that several of the Massachusetts regulations at issue were preempted by federal law regulating tobacco products, the Court did not hesitate to reach and decide the First Amendment issues presented. *Id.* at 541. The Massachusetts regulations pertained also to cigar and smokeless tobacco advertising, neither of which is regulated by the federal government. *Id.* at 533.

165. See *infra* Part III.A.1.

1. Basic Overview of the Commercial Speech Doctrine

The commercial speech doctrine is of relatively recent constitutional vintage. Until the 1970s, the Court considered commercial speech to be merely an aspect of economic activity, and therefore held that such speech could be regulated to the same extent as the underlying commercial practice.¹⁶⁶ In the 1970s, this view came under scrutiny by legal scholars. In a seminal article, Professor Martin Redish identified several problems with the Court's view that purely commercial speech enjoyed no First Amendment protection.¹⁶⁷ Most importantly, Redish recognized that much commercial speech serves First Amendment values by proliferating information of political, social, economic, and personal importance, just as do other forms of speech that have traditionally been granted constitutional protection for the purpose of serving that function.¹⁶⁸ Redish argued that Commercial speech should be afforded constitutional protection because listeners have an interest in the content of such speech.¹⁶⁹

In 1976, the Court turned away from its commercial speech precedent and adopted the basic view set out by Redish. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁷⁰ the Court invalidated a Virginia statute that prohibited pharmacists from advertising the price of prescription drugs.¹⁷¹ The Court announced that a commercial advertisement is constitutionally protected because it furthers the societal interest in the free flow of

166. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that “the Constitution imposes no . . . restraint on government as respects purely commercial advertising,” and rejecting a First Amendment challenge to a New York City ordinance forbidding commercial pamphleting on city streets). In truth, the *Valentine* court engaged in little analysis as to whether “purely commercial” speech is protected, but merely presumed that it was not. See *Cammarano v. United States*, 358 U.S. 498, 513–14 (1959) (Douglas, J., who had taken part in *Valentine*, concurring) (“[*Valentine*] held that business advertisements and commercial matters did not enjoy the protection of the First Amendment The ruling was casual, almost offhand. And it has not survived reflection.”).

167. See Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

168. *Id.* at 432–34.

169. See *id.*

170. 425 U.S. 748 (1976).

171. *Id.* at 769.

commercial information.¹⁷²

Redish had argued in support of commercial speech protection by highlighting the Court's analysis in *New York Times v. Sullivan*,¹⁷³ in which the Court sanctified the principle that a central purpose of the First Amendment is to lend support to the production and dissemination of information crucial to the healthy functioning of a democratic society.¹⁷⁴ To that end, the *Sullivan* Court famously held that no liability could attach to a newspaper for negligently publishing defamatory statements about a public official.¹⁷⁵ Permitting liability to attach for *negligently* false statements would threaten to chill the dissemination of truthful, valuable speech.¹⁷⁶ The Court insisted on providing wide latitude for experimentation and mistake in the context of political speech.¹⁷⁷ In fashioning the modern commercial speech doctrine, however, the Court departed from this crucial feature of *Sullivan*. The problem of over-deterrence, the Court concluded, has far less purchase in connection with purely commercial speech than it does with regard to political speech.¹⁷⁸ The Court explained this most clearly in its second cornerstone modern commercial speech case, *Bates v. State Bar of Arizona*.¹⁷⁹

Advertising that is false, deceptive, or misleading of course is subject to restraint. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private

172. *Id.* at 765 ("To this end, the free flow of commercial information is indispensable.").

173. 376 U.S. 254 (1964).

174. *Id.* at 266; see Redish, *supra* note 167, at 435–36.

175. Redish, *supra* note 167, at 436.

176. *Sullivan*, 376 U.S. at 300–01.

177. The Court further reasoned that there is no concern with over-detering *knowingly or recklessly* false speech about a political figure, and so such valueless speech could be prohibited directly without inhibiting the wide latitude that must be provided to ensure the free flow of useful speech. *Id.* at 291.

178. See *id.*

179. 433 U.S. 350 (1977).

benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.¹⁸⁰

Other justifications have been offered for allowing firmer government regulation of false and misleading speech in commercial than in non-commercial contexts, but the reasons specified here are the most enduring and important: commercial speakers have great knowledge of the truth or falsity of their speech, so it is easy for them to limit themselves to truthful speaking, and the profit-motive impelling commercial speech makes certain that such speech will be undeterred by aggressive regulation.¹⁸¹ Though only the last

180. *Id.* at 383–84 (internal citations omitted). *Bates*, of course, concerned advertising by a lawyer. First Amendment scholars have sometimes treated the Court's many lawyer advertising cases as a kind of distinct eddy swirling off to the side of mainstream commercial speech analysis. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630 (1990) ("At present, the law of attorney advertising has grown to such an extent that it has been able to seal itself off from its roots in first amendment theory."); see also Smolla, *supra* note 124, at 1290 n.41 ("Lawyer advertising at times appears to be regarded as a 'second class' commercial speech citizen, not entitled to full participation in the free speech privileges and immunities other advertisers enjoy."). In my view, the lawyer advertising cases play a pivotal part in the architecture of the modern commercial speech doctrine. The Court itself, as is evidenced in the quote in the text that attends this footnote, has never treated such cases as fundamentally different from other commercial speech cases, and routinely relies on lawyer advertising cases in non-lawyer commercial speech cases. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001) (citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995)); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (citing *Bates*).

181. The Court has identified several other justifications for affording less constitutional protection to commercial speech. One justification is the speech is of lesser value than political speech. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 81 (1983) (Stevens, J., concurring) ("The commercial aspect of a message may provide a justification for regulation that is not present when the communication has no commercial character."). Another justification is that the need to regulate commercial speech would necessarily level the protections afforded political speech if both forms of speech were reviewed under the same standard. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring) ("[I]t is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed."). Yet another justification is that because government enjoys the greater power to restrict or forbid a particular kind of commercial enterprise, it must enjoy the lesser power to regulate the

justification may survive scrutiny, it is enough to sustain effective government regulation of commercial speech, at least with respect to junk-food advertising to children, in light of the enormity of contemporary corporate power.¹⁸²

Although he was certain that commercial speech should be afforded some constitutional protection, Redish was himself initially agnostic as to exactly what level of scrutiny should attach to commercial speech regulation.¹⁸³ After establishing the basic principles of its modern commercial speech doctrine in *Virginia Pharmacy* and *Bates*, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*¹⁸⁴ formalized its approach to commercial speech cases, laying out a four-part test that establishes an "intermediate" level of review:

[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.¹⁸⁵

This test has guided the Court's approach to every commercial

advertising of such enterprises. *See, e.g.,* *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 475–76 (1997) (“While the First Amendment unquestionably protects the individual producer’s right to advertise its own brands . . . [a]ppropriate respect for the power of Congress . . . provides abundant support for the constitutionality of these marketing orders.”).

182. “Power economics,” which predicts that market forces will compel corporations to discover and exploit situational influence over consumers even where there is no conscious intention to do so on the part of corporate officers, may cut against the “greater access to the truth of the speech” justification advanced in support of lesser protections for commercial than for non-commercial speech. *See supra* text accompanying note 57. On the enormity of corporate power in contemporary American society, see Hanson & Yosifon, *The Situation*, *supra* note 21, at 193–203.

183. *See* Redish, *supra* note 167, at 447.

184. 447 U.S. 557 (1980).

185. *Id.* at 565. The Court describes the *Central Hudson* test as being very similar to the test it uses to analyze “time, place, and manner” restrictions on constitutionally protected speech. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 573 (2001).

speech case since *Central Hudson*. In recent years, however, commentators and several justices have urged the Court to drop *Central Hudson* in favor of the "strict scrutiny" that it traditionally applies to government regulations aimed at non-commercial speech.¹⁸⁶ Indeed, even as the Court has formally maintained allegiance to *Central Hudson*, some commentators argue that the Court's practice in commercial speech cases in fact evinces a trend towards stricter levels of scrutiny,¹⁸⁷ a trend which may portend a coming end to *Central Hudson*, but which in any event is crafting a commercial speech jurisprudence which increasingly restrains government efforts to regulate commercial speech.¹⁸⁸

Professor Redish himself today contends that there is no principled justification for denying commercial speech the same level of First Amendment protection as is afforded non-commercial speech.¹⁸⁹ He shares the view of other First Amendment scholars who see in the maintenance of a special category of "commercial speech" a genuine threat to core free speech interests.¹⁹⁰ Redish warns that any argument licensing greater government regulation of commercial speech can, by logical extension, be deployed against social and political speech as well; such arguments must therefore be avoided, Redish insists, if First Amendment interests are to be served.¹⁹¹ For example, the argument that the robustness of the

186. See, e.g., Smolla, *supra* note 124, at 1292; Kozinski & Banner, *supra* note 180; see also *Lorillard*, 533 U.S. at 572 (Thomas, J., concurring); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996).

187. See, e.g., Smolla, *supra* note 124, at 1292 ("[E]xamination of the actual case decisions demonstrates that the trajectory of modern commercial speech law has been an accelerating rise of protection for advertising.").

188. *Id.*

189. Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 565 (1997) ("[C]areful examination reveals that without question, none of the remaining arguments relied upon to justify commercial speech's second class status justifies the distinction's continued existence.").

190. See Kozinski & Banner, *supra* note 180, at 630; see also Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1992-1993); cf. Alex Kozinski and Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747 (1993) (providing a brilliant historical analysis of the commercial speech doctrine).

191. See Redish, *supra* note 189 (arguing that justifications for regulating commercial speech threaten non-commercial speech freedoms). Below, I

profit motive behind commercial speech can justify the government prohibiting false and misleading speech altogether in the commercial speech context without fear of over-detering the production of valuable speech, cannot be limited so as to apply only to commercial speech.¹⁹² After all, Redish argues, much non-commercial speech is backed by very strong motives, such as a strong commitment to a moral or political vision.¹⁹³ Redish has also extended his original argument to contend that commercial speech is just as important to people, perhaps even *more* important, as is social and political speech.¹⁹⁴ Thus, the importance of commercial speech counsels in favor of affording it at least as much First Amendment protection as is thought to be appropriate for non-commercial speech.¹⁹⁵ The only coherent and normatively justifiable thing to do, Redish concludes, is to treat commercial and non-commercial speech the same for First Amendment purposes.¹⁹⁶

I think that such a position is extremist and implausible. It would have outrageous consequences if it were truly embraced. For example, it must follow from Redish's view that business corporations could not be held liable for merely negligent product advertising. For instance, junk-food advertising that was merely negligent in its failure to accurately to convey, say, a food's fat content, could not be prohibited. Since there is no way to distinguish commercial from non-commercial speech, and because commercial speech is possibly *more* valuable than political speech, the concerns that animated *Sullivan* must necessarily apply to commercial speech as well. Thus, no claim based in negligent speech could stand without unduly chilling commercial speech under this view. Such a result would obviously work an extremely radical alteration to contemporary business regulation.¹⁹⁷

analyze the regulation of corporate political speech in the context of "deep capture" advertising. See *infra* Part IV.

192. See Redish, *supra* note 189, at 578.

193. *Id.*

194. *Id.* at 579.

195. *Id.* at 564–65.

196. See *id.* at 583–84.

197. Redish's insistence that arguments advanced to justify latitude for commercial speech always threaten core political speech if accepted, is also extreme and unavailing. Many kinds of speech are regulated for reasons that *could* justify core political speech suppression if taken at a sufficient level of

Redish does not recognize, let alone justify, such destructive implications in his commercial speech theory. The oversight reflects a general failure on the part of proponents of strict scrutiny protection for commercial speech to appreciate the depth of the problem posed by misleading and manipulative commercial speech. Commercial speech serves First Amendment interests when it flows both "freely *and* cleanly."¹⁹⁸ The insufficient attention to the problem of ensuring the *clean* flow of commercial speech stems from a too stylized and abstract conception of human information processing, a dispositionist conception which tends not to see the manipulative power of commercial speech, and where it does see it, expresses an unwarranted confidence that the problem of misleading or manipulative speech can always be solved with more speech.¹⁹⁹

abstraction. Consider, for example, restrictions on comments to the press by a lawyer about an ongoing trial in which she is involunt. The abstract justifications for such a restriction—protecting the legal system's interest in the sanctity of the trial process—could also be applied to limit press coverage of ongoing trials. But abstract reckonings did not render the contours of the First Amendment; experience draws the lines that limit the applicability of given justifications. Thus, while lawyers may not speak freely, the press may. Redish's assertion that the "robustness" justification cannot be contained to commercial speech has certain appeal as an analytic proposition, but upon inspection there remain "common sense" distinctions between commercial and non-commercial speech, which make the robustness justification more reasonable when applied to commercial speech. *See* *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) ("Our commercial speech doctrine rests heavily on 'the "common-sense" distinction between speech proposing a commercial transaction . . . and other varieties of speech,' and appellant's advertisements undeniably propose a commercial transaction." (citation omitted)). Commercial speech is concerned with proposing a commercial transaction, the truth about which the commercial speaker has, or should have, particular knowledge (respecting the attributes of the product, the price at which it is offered, etc.). The profit motive drives the communication of this particular knowledge. These two factors, profit motive and particularized knowledge, working in tandem, create the robustness justification, and the absence of this tandem in other categories of speech, such as social and political speech, limits its application to the commercial speech context. In any event, to the extent that the robustness of speech provides a compelling reason for greater regulatory latitude in other areas, that greater regulatory latitude should be considered in those areas as well. *See*, for example, my discussion of "drown out" and "overwhelmance" justifications for limiting corporate social and political speech, *infra* text accompanying notes 383–399.

198. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

199. In his seminal article on commercial speech and the First Amendment,

Under this view, there is no need, much less justification, for restricting commercial speech.²⁰⁰ If it is accepted, as critical realism urges, that intuition un-criticized yields a false conception of human agency, one that does not clearly appreciate human vulnerability to manipulation by commercial speech, then the problem of manipulative speech must become a central concern in commercial

Redish admitted that “much of advertising is directed not to appeal to the individual’s intellectual, rational capacities, but rather to a consumer’s subconscious, irrational desires or self-image.” Redish, *supra* note 167, at 446. But Redish was nonplused:

[T]he first amendment’s basis is primarily normative rather than factual. Although the first amendment assumes that man has a will and an intellect, its concern is that he *should* use them; it does not turn on whether he *does* use them. The less he does use them, the greater is the need to encourage their use. The more non-rational appeals that are made, the more important it is to protect appeals with a rational basis.

Id. I discuss the inadequacy of the “more speech” retort to the problem posed by misleading speech in Part IV.

200. For example, in his seminal writings on tobacco advertising, Professor Redish glosses over the widely expressed concern that tobacco advertising has powerfully mislead consumers in a manner that grossly misconstrues that concern. “Some argue,” he writes, “that regardless of its content, tobacco advertising is inherently misleading in suggesting or implying that use of such a harmful product can ever be a positive or beneficial experience.” Redish, *supra* note 153, at 598. This parlor version of the debate about tobacco advertising makes no attempt to engage the extensive social scientific and legal theoretic study of the power tobacco advertising to mislead consumers about the health risks associated with smoking. See, e.g., Jon Hanson & Kyle Logue, *The Costs of Cigarettes*, 111 YALE L.J. 1163 (2002); Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) (reviewing decades of social scientific study of the manipulative power of cigarette advertising). Elsewhere, Redish treats the problem of the misleading power of advertising as a matter of logical indeterminacy. For instance, Redish writes in his discussion of advertising campaigns that employ messages of health and vitality in connection with smoking: “The fact that an activity is portrayed in advertising as pleasurable does not necessarily imply that the activity is also healthful.” Redish, *supra* note 153, at 609. Of course it does not *necessarily* imply that, but the fact that such a conclusion is not necessary is hardly conclusive as to whether or not it *does* yield a misleading implication. For Redish, the question of what advertising does is indeterminate, and because of the First Amendment’s presumption in favor of speech, the tie of the analytic uncertainty goes to speech. But, this need not be a matter of analytic uncertainty. It can become, and is treated here, as a question of critical inquiry and distinction.

speech theory. A commercial speech theory focused only on the "free" and not the "clean" flow of commercial information serves the profit-making interests of commercial speakers, but not the listener interests that granting First Amendment status to commercial speech was meant to protect.

In what follows, I analyze the modern commercial speech doctrine, and its supposed recent tightening, from a critical realist perspective. I hope to demonstrate that the doctrine is capable, analytically and normatively, of accommodating a ban on junk-food advertising such as the "Tombstone Blues."

2. Downward Sloping Demand Curves and the Centrality of the Dispositional Actor in the Commercial Speech Doctrine

The core theory of the modern commercial speech doctrine conforms to a highly dispositionist conception of human agency. People are construed as receiving and rationally analyzing advertised information in order to exercise consumer choices that satisfy their preferences and make them better off.²⁰¹ In this section, I will argue that the Court always forbids the regulation of commercial speech where the avowed or implicit purpose of the regulation is the suppression of dispositional choice. In *Central Hudson*, the Court purported to express a balancing test, but from the earliest commercial speech cases, the Court has consistently refused to find that the suppression of dispositional choice through the prohibition of truthful, non-misleading information could be countenanced by the First Amendment.²⁰²

This analysis explains an important adjudicative line in the commercial speech cases, spanning from the earliest annunciation of the modern commercial speech doctrine through the most recent cases. It does not, however, explain all of the cases, or all that the Court has had to say in formulating its jurisprudence in this area. There is also imminent in the commercial speech doctrine, I will argue, a conception of the situational character. Where the Court

201. See *supra* Part III.A.1 (summarizing fundamental presumptions of the rational actor and other dispositionist models of human agency).

202. Readers familiar with the commercial speech cases may immediately conjure *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 340 (1986), as a contrary example. I address *Posadas*, *infra* Part III.B.2. (reconciling *Posadas* and *44 Liquormart*).

appreciates, or is made to appreciate, the powerful, situational influence of advertising, the Court expresses a willingness to countenance commercial speech regulation. It is this latter aspect of the commercial speech doctrine that the tombstone blues develops and exploits. A crucial step in that endeavor, however, is to examine and explain the central part played by the conception of the dispositional actor that, to be sure, now resides at the core of the commercial speech doctrine.

The dispositional actor is present in its most essential form at the forging of the commercial speech doctrine in *Virginia Pharmacy*.²⁰³ That formative case involved, recall, the state of Virginia's total prohibition on pharmacist advertising of prescription drug prices.²⁰⁴ Now, among the most hallowed scriptures of the dispositional/rational actor schema of consumer agency, is consumer response to price..²⁰⁵ It is here that the Court has at its disposal the near talismanic power of the "downward sloping demand curve."

The "downward sloping demand curve" refers to a basic principle of economics which holds that because individuals independently value commercial goods at a given price, demand for a product will increase when the price of a product drops (because more people will value it at a price greater than it is being sold at, and will therefore be more likely to purchase it). In *The Situational Character*, Professor Hanson and I argued that this basic framework reflects, and is supported by, common sense dispositionism.²⁰⁶ The downward sloping demand curve trope reflects the strongly held dispositionist intuition that consumers hold privately ordered preferences that they bring to a given behavioral situation.²⁰⁷ It is the intuitive plausibility of this simple dispositionist supply-and-demand story that makes the basic rational actor model so easily digestible by conventional legal analysis, and, it turns out, by the commercial speech doctrine.²⁰⁸ The parable of the downward sloping demand

203. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

204. *See id.*

205. *See* Hanson & Yosifon, *The Situation*, *supra* note 21, at 145–57.

206. *See* Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 170–80.

207. *See id.* at 139–41.

208. The fact that demand curves do, in fact, slope downward—that is, that demand does increase as price decreases, and decreases as price increases—is

curve is ripe for incantation wherever *price* communication is concerned. Where the communication of price information is *prohibited*, the Court sees starkly the suppression of dispositional choice, which it is the very purpose of the First Amendment to enable and facilitate. Where the government avowedly seeks to limit speech in order to interrupt that First Amendment task, as it did in *Virginia Pharmacy*, the Court will call it a constitutional violation.²⁰⁹

Indeed, most of the leading cases striking down advertising regulations involve, at their core, the prohibition of price advertising.²¹⁰ In each such case, the Court finds it impossible to see how price advertising could be false or misleading, and impossible to see how the proscription of such advertising could serve any legitimate government interest. In *Virginia Pharmacy*, the state argued that price advertising would result in price competition, which would drive consumers to cheaper pharmacists with perhaps lower standards of quality, thereby simultaneously harming the professionalism of pharmacists and leaving consumers worse off.²¹¹ The Court replied by invoking what has become an important axiom of its commercial speech jurisprudence:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that . . . people will

often advanced as support for the view that consumers do behave rationally and that the “rational actor” model represents a plausible modeling of human behavior for use in economic and legal analysis. Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53, 53 (1985). Important, un-rebutted arguments have also been made; however, the fact that demand curves are downward sloping does *not* provide evidence that consumers behave rationally. Nobel Prize winning economist Gary Becker demonstrated that demand curves would slope in a downward fashion even if consumers made consumption decisions *randomly*, rather than rationally, because nearly every consumer has a limited amount of money to spend. *See id.* at 153–70. I do not pursue this debate here, as I am centrally concerned with analyzing the effect of the intuitive plausibility of what I am calling the downward-sloping demand curve trope on the Court’s commercial speech jurisprudence.

209. *See, e.g., Virginia State Bd. of Pharmacy*, 425 U.S. at 773.

210. Either by the regulation singling out price advertising in particular, or by the regulation banning all advertising relating to a legal product, *including* price advertising. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy*, 425 U.S. 748.

211. *Virginia State Bd. of Pharmacy*, 425 U.S. at 766–68.

perceive their own best interests if only they are well enough informed It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.²¹²

Precisely what the Court means is that the state may not advance a paternalistic approach through *speech regulation*, even though it repeatedly recognizes in commercial speech cases that government could directly prohibit or limit many of the activities that it often impermissibly seeks to suppress through speech regulation.²¹³

This same vision of dispositional decision-making guides the Court's analysis in *Bates*, where the Court invalidated on First Amendment grounds an Arizona law forbidding lawyers from advertising.²¹⁴ The prohibition against lawyer advertising had deep roots in the American legal profession; challenging this practice would have been inconceivable before the revolution then underway in the Court's commercial speech doctrine.²¹⁵ Once again in *Bates*, the Court's analysis focused on the government's ban on price advertising.²¹⁶ The Court could not see the furtherance of any permissible purpose in such a prohibition: "[W]e view as dubious any justification that is based on the benefits of public ignorance."²¹⁷ What is missing in price advertising bans, such as were presented in *Virginia Pharmacy* and *Bates*, is any occasion for the Court to

212. *Id.* at 770.

213. Seeking to influence consumer behavior, such as suppressing consumption of a particular good, is a permissible legislative purpose. Forbidding prostitution or the recreational use of certain drugs are examples of legislative regimes widely perceived as paternalistic yet constitutionally permissible. See J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 539 n.144 (2004) ("[L]aws prohibiting gambling, drug use, prostitution, and abortion have both a moral and a paternalistic aspect.").

214. See *Bates*, 433 U.S. at 350.

215. See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 799–809 (7th ed. 2005).

216. See *Bates*, 433 U.S. at 350.

217. *Id.* at 375 (emphasis added). The earnestness with which the Court strikes down advertising regulations thought to be advanced for the purpose of manipulating choice evinces, in my view, a faithful opposition to manipulation that may be exploited in the development of a more robust understanding of the manipulative power of advertising than is presently evident in the commercial speech doctrine.

encounter the situational power of advertising, immersed as it is in the quintessential explanation of dispositional behavior – price influence

When we turn from these now classic commercial speech cases to the more recent cases, we see, in my view, merely an application of this core principle. For example, in an important commercial speech case decided in 1996, *44 Liquormart, Inc. v. Rhode Island*,²¹⁸ the Court struck down on First Amendment grounds a Rhode Island law prohibiting the advertising of liquor prices.²¹⁹ Aside from pertaining to the sale of liquor rather than prescription drugs or legal services, the regulation at issue in *44 Liquormart* was very similar to the regulations struck down in *Virginia Pharmacy* and *Bates*.²²⁰ The Court's analysis of the ban in *44 Liquormart* was also broadly similar to that employed in those early cases, but coming after *Central Hudson*, the *44 Liquormart* analysis was framed in terms of the *Central Hudson* test.²²¹

The *Central Hudson* test, recall, first requires the Court to determine whether the commercial speech at issue concerns a lawful activity and is "not misleading."²²² If those conditions are not satisfied, the speech does not come within First Amendment protection.²²³ I argue below that the commercial speech doctrine is unfortunately, but promisingly, underdeveloped with respect to the first step of the *Central Hudson* test.²²⁴ One of the chief reasons for this is that litigants seeking to *defend* commercial speech regulation, principally state attorneys general and state bar associations, have

218. 517 U.S. 484 (1996).

219. *See id.*

220. The Court's most recent commercial speech case, *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), presented yet another echo of the basic ban at issue in *Virginia Pharmacy*. *Thompson* concerned a total ban on the advertising of "compound" drugs that are exempted from the FDA's review process, yet legal to consume with a doctor's prescription. *Id.* The government again waived any inquiry into the misleading power of the advertising, forcing the Court to conclude that the ban "amounts to a fear that people would make bad decisions if given truthful information about compounded drugs." *Id.* at 377. Because this fear could not be patronized through speech regulation without violating the First Amendment, the ban was overturned. *Id.*

221. *44 Liquormart*, 517 U.S. at 492.

222. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564–65 (1980).

223. *Id.*

224. *See infra* text accompanying note 238.

repeatedly conceded the first step of the inquiry to the party challenging the regulation, making their defensive stand instead on the second, "balancing" part of the test, which asks if the regulation advances a substantial government interest in a manner no more restrictive than necessary to accomplish that interest. For instance, the Rhode Island attorney general followed this pattern in *44 Liquormart*, conceding that the banned advertising was not misleading, and arguing instead that the state had a substantial interest in promoting temperance, an interest that the advertising ban furthered in a sufficiently tailored fashion.²²⁵

Approaching the case in such a posture, the Court refused to sustain the liquor-price advertising ban, holding once again that the First Amendment prohibits the restriction of dispositional choice through the prohibition of truthful, nonmisleading speech.²²⁶ Even though the government could otherwise limit the choice to purchase alcohol—such as by forbidding purchases on a Sunday—it could not do so by regulating truthful non-commercial speech without running afoul of the First Amendment.²²⁷ The government may not keep commercial information from consumers out of a fear that they will perceive the information correctly and act on it in a manner that the government believes inimical to consumers' interests.²²⁸ Justice Thomas, in his *44 Liquormart* concurrence, urged the adoption of strict scrutiny for such cases, for reasons that I have argued already shape the Court's heartland commercial speech jurisprudence:

[Where] the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test . . . should not be applied, in my view. Rather, such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'non-commercial' speech.²²⁹

The case perhaps most strongly thought to signal an expanding protection in the Court's contemporary commercial speech

225. *44 Liquormart*, 517 U.S. at 504.

226. *Id.* at 496 (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)).

227. *Id.* at 496–97.

228. *Id.* at 497 (citing *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

229. *Id.* at 518 (citation omitted).

jurisprudence is *Lorillard*, introduced above, in which the Court overturned the state of Massachusetts's tobacco billboard advertising ban. In the principal opinion in *Lorillard*, Justice O'Connor recognized that *Central Hudson* seems to stand on precarious ground as "several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases."²³⁰ Nevertheless, O'Connor wrote, "we see no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."²³¹ Indeed, the reason *Central Hudson* provided an "adequate basis for decision" is that in cases involving the admitted restriction of truthful nonmisleading information for the purpose of disabling dispositional choice, the Court's scrutiny has been forbidding.

In *Lorillard*, the Court struck down the Massachusetts billboard advertising ban, despite the fact that the regulation purported only to regulate advertising directed at children, which the ban sought to accomplish by forbidding such advertising within 1000 feet of schools.²³² The Court accepted that the state has a substantial interest in reducing children's consumption of tobacco—that interest was indisputable given that tobacco is illegal for children to consume.²³³ The legitimacy of advancing this interest through a billboard advertising ban, however, had to be balanced against the ban's incursion on the First Amendment interests of adults,²³⁴ for it is a bedrock First Amendment principle that "the government interest in protecting children from harmful materials . . . does not justify unnecessarily broad suppression of speech addressed to adults."²³⁵

230. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

231. *Id.* at 554–55 (citations omitted). Justice Thomas, in his *Lorillard* concurrence, further developed his view that commercial speech should be afforded the same protections, and analyzed under the same strict scrutiny framework, as non-commercial speech. In *Lorillard*, Thomas wrote: "I share the Court's view that the regulations fail even the intermediate scrutiny of *Central Hudson* . . . [but] I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'" *Id.* at 572 (Thomas, J., concurring).

232. *Id.* at 566.

233. *See id.* at 564.

234. *Id.*

235. *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997)).

In the Court's colorful phrasing, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."²³⁶

In *Lorillard*, the government again irredeemably sandbagged its own case by its unwise waiver of the first part of the *Central Hudson* inquiry.²³⁷ The government did not need to show that the advertising was false or misleading to justify its suppression vis-à-vis children—but to show that the speech was not unwarrantedly kept from adults, the question of whether it was false or misleading, or truthful and informative, becomes exceedingly important. With the state waiving this issue, the Court was left to analyze the propriety of what it considered to be "[i]n some geographical areas . . . nearly a complete ban on the communication of truthful information about [tobacco products] to adult consumers."²³⁸ As Justice Thomas noted in his

236. *Id.* (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74 (1983)).

237. *Id.* at 555 ("The Attorney General has assumed for purposes of summary judgment that petitioners' speech is entitled to First Amendment protection.").

238. *Id.* at 562. The Court's characterization of the effect of the ban is grossly overbroad, even ridiculous. Even with the Massachusetts ban in place, tobacco companies could still communicate truthful information about tobacco products to adults through print advertising or direct mailing. The regulations also permitted retailers to indicate through limited signage that they sold tobacco products. See *id.* at 536. The Court's treatment in *Lorillard* is terribly disappointing, even embarrassing, in its failure to engage at all the obvious "captive audience" problem presented by billboard advertising, a problem the Court had actually addressed in a fairly sophisticated fashion in a tobacco billboard advertising prohibition case seventy years before *Lorillard*. In *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), the Court upheld a Utah prohibition of tobacco advertising on billboards against constitutional challenge:

Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers or

concurrence, "[t]hese concessions . . . make this an easy case, one clearly controlled by 44 *Liquormart*."²³⁹ Left with no other way of construing the advertising's influence on adult consumers, the waiver of the first part of the *Central Hudson* test leaves the balancing inquiry in *Lorillard* to be controlled by the deductively applicable principle that discourse to adults cannot be limited to what is appropriate for the sandbox.

B. Beyond Downward-Sloping Demand Curves—The Situational Character and the Commercial Speech Doctrine

The commercial speech doctrine thus reflects and entrenches a highly dispositionist conception of human agency. The core of the Court's jurisprudence in this area revolves around a stylized picture of a rational actor accumulating information, the better to make consumption decisions that are in her own best interest.

Yet, one reason that dispositionist expression is so clearly evident in commercial speech jurisprudence is because it is the expression that we, in our dispositionism, are primed to see. If this orientation can be restrained, a second strand of reasoning can be discerned in the commercial speech cases, one that evidences a latent recognition and willingness to accommodate the reality of the situational character. In the previous section, I argued that where the Court sees government constraining dispositional choice through speech prohibition, the Court inevitably strikes the regulation down.²⁴⁰ However, where the Court has occasion to recognize the

magazines. The legislature may recognize degrees of evil and adapt its legislation accordingly.

Id. The principle opinion in *Lorillard* cites *Packer* just once, for a proposition concerning the presumption of no federal preemption of areas of traditional state regulation, but without discussion or even mentioning that the case involved the regulation of billboard advertising of tobacco products. *Lorillard*, 533 U.S. at 541. The failure to engage this troubling dimension of billboard advertising is another consequence of the lack of any critical inquiry into the effect of the advertising due to the state's waiver of the first part of the *Central Hudson* test.

239. *Lorillard*, 533 U.S. at 578.

240. There is language in *Central Hudson* itself intimating that the Court would have countenanced a paternalistic purpose at the heart of a ban on advertising promoting energy consumption. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 573 (1980) ("[I]t leaves open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity."). But the Court *did* overturn the ban at issue in

situational power of advertising to influence human thinking and behavior in unseen, potentially manipulative ways, the Court sustains the advertising regulation, or at least indicates that it would be willing to do so if the case for the situational character were made.²⁴¹ This line of reasoning makes clear that the First Amendment does *not* sanctify any particular conception of human decision-making. The government need not embrace an intuitive conception of human agency – if it makes the case, it may regulate with reference to a more scientifically informed model of consumer behavior. The adoption, on the part of the government, of a situational character view of human agency, might produce acceptable, prudent commercial speech regulation that would be inconceivable, or conceived of as unwise, under a highly dispositionist framework.

1. Seeing the Situational Character in the Commercial Speech Cases

While this second strain in the commercial speech doctrine is evident even in *Virginia Pharmacy*,²⁴² it is easier to grasp in *Bates*, which, together with *Virginia Pharmacy*, outlined the core principles of the Court's modern commercial speech doctrine prior to its formal expression in *Central Hudson*.²⁴³ As noted, once the two-part *Central Hudson* test was established, it separated for the purposes of analytic inquiry the question of whether speech was false or misleading on the one hand, and, if it was not, whether the challenged regulation nevertheless furthered a substantial government interest in a sufficiently tailored fashion, on the other.²⁴⁴ Litigants, perhaps looking wide-eyed at the intermediate balancing standard promised in the test's second part, have routinely skipped over the first part of the test, waiving the issue of whether the

Central Hudson (on the grounds that it was overbroad) and has, in fact, never allowed an avowedly paternalistic purpose to support commercial speech regulation. *Id.* at 565; *see also* Redish, *supra* note 153, at 613 (“At most, the Court’s acceptance of the pro-paternalism model in *Central Hudson* was dictum, and implied dictum, at that.”).

241. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 348 (1986) (sustaining a ban on casino advertising to Puerto Rican residents).

242. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“[M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem.”).

243. *See supra* text accompanying note 180.

244. *See supra* text accompanying notes 184–185.

commercial speech at issue is "misleading."²⁴⁵ In *Bates*, the analysis was not yet so bifurcated. *Bates* therefore provides an opportunity to glimpse the Court grappling directly with the "misleading" question.²⁴⁶

At issue in *Bates*, beyond the price advertising prohibition, was, for example, the defendant lawyers' advertising describing their low-fee services as a "legal clinic"—a usage which the state claimed was misleading to consumers, and could thus be proscribed without violation of the First Amendment.²⁴⁷ It is not exactly clear how the Court went about scrutinizing this assertion, but it appears that the Court just eyeballed it with a kind of rough situation-sense:

On this record, these assertions [of the ways the term could be misleading] are unpersuasive. We suspect that the public would readily understand the term 'legal clinic'—if, indeed, it focused on the term at all—to refer to an operation like that of appellants' that is geared to provide standardized and multiple services.²⁴⁸

The Court concludes that the term is not misleading; after all, "the clinical concept in the sister profession of medicine surely by now is publicly acknowledged and understood."²⁴⁹

245. See *infra* text accompanying notes 248–256, suggesting that another reason for this pattern is because government approaches commercial speech regulation with an underdeveloped conception of consumer behavior and decision-making, and so focuses on the second part of the test, which does not critically inquire about the sources of such behavior.

246. See *supra* note 180, arguing that the lawyer advertising cases play a fundamental part in the Court's commercial speech jurisprudence.

247. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 378–79 (1977).

248. *Id.* at 381. While the second part of the *Central Hudson* test is a classic formulation of "intermediate scrutiny," it is not at all clear what standard of review the Court applies to the first part of the test with respect to whether speech is "false" or "misleading" and therefore entitled to First Amendment protection at all. The lawyer advertising cases reveal an analytic approach which might be said to be a kind of constitutional version of what Karl Llewellyn called "situation sensing." See Hanson & Yosifon, *The Situation*, *supra* note 21, at 293–98 (analyzing the latent dispositionism in Llewellyn's "situation sense" theory); cf. Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 40–41 (urging the application of "contextualization" in constitutional analysis, but also observing that "[c]elebrations of situation sense and practical reason frequently dissolve into philosophical mush").

249. *Bates*, 433 U.S. at 382. On the other hand, people might more readily think that a "legal clinic" involved some kind of public-service workshop,

Justice Powell saw things differently and dissented.²⁵⁰ His departure from the majority stemmed simply from his differing naked-eye assessment of whether the advertising at issue was, in fact, misleading: "The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product. As a result, the type of advertisement before us inescapably will mislead many who respond to it."²⁵¹ Powell looked at the price listings for so-called standardized legal services in the legal clinic's advertising—such as prices for uncontested divorces or wills—finds they are misleading, and thus that they can be prohibited without Constitutional offense.

Now, the question of whether people are misled by a for-profit law firm advertising itself as a "legal clinic" is an empirical one. In the context of advertising involving the legal profession, the Court betrays a particular confidence in its knowledge of what is or is not misleading to consumers—this is, after all, the one area of social life about which the Court may consider itself to have a peculiar knowledge. A footnote in Powell's dissent makes this clear:

A high percentage of couples seeking counsel as to divorce desire initially that it be uncontested. They often describe themselves as civilized people who have mutually agreed to separate; they want a quiet, out-of-court divorce without alimony. But experienced counsel knows that the initial spirit of amity often fades quickly when the collateral problems are carefully explored.²⁵²

Put differently, Powell appreciated that people may be misled because they think of themselves as rational actors who will bring stable preferences with them to the circumstance of obtaining a divorce. But Powell implicitly understood that people are in fact situational characters; that the situation of divorce—the legal proceedings, the coming acrimony, etc., will alter their preferences and behavior in ways they may not anticipate or appreciate. Reviewing the lawyer's divorce advertising against that reality, rather than against consumers' own intuitions about themselves, the advertising can be seen as potentially misleading. Importantly, the

rather than a for-profit enterprise.

250. *Id.* at 389.

251. *Id.*

252. *Id.* at 394 n.5.

view of the matter that counts is not the lay belief, but the learned one.

Powell's comment comes in dissent, but the majority differs only in their assessment of consumer reaction to the speech, not in their analytic approach.²⁵³ Both the majority and the dissent make an empirical judgment about whether the advertisement is misleading or not, and that judgment determines the constitutional status of the speech. Both the majority and the dissent rely on their own experience and intuition to determine whether the advertisement is misleading or not. In the preceding sections, I argued that social science reveals that our intuitions about what is moving us, or how things affect us, is often wrong.²⁵⁴ There is, however, nothing in these cases that suggests that our intuitive presumptions about what moves us have strong constitutional standing—indeed, the Court in *Bates* seems to be relying on its own sense that it has a highly *informed* understanding about what does or does not influence consumers of legal services. Despite the fact that litigants, and the Court itself, often rely on mere intuition to analyze potentially "misleading" speech, intuitive presumptions enjoy no sacred status and may be repudiated by empirically driven argument seeking to impose commercial speech restrictions.

In another important lawyer advertising case, *In re R. M. J.*,²⁵⁵ for example, the Court recognized that intuitions about what is misleading, to whom, and in what contexts, may be wanting, and indicated that its approach to commercial speech regulation will be solicitous of arguments that intuitions are wrong:

If experience with particular price advertising indicates that the public is in fact misled or that disclaimers are insufficient to prevent deception, then the matter would come to the Court in an entirely different posture. The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising. If experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be 'inherently' misleading, the Court must take such experience

253. *See id.* at 353–85.

254. *See supra* Part II.B.1.

255. 455 U.S. 191 (1982).

into account.²⁵⁶

The Court also recognizes that specific methods of lawyer advertising may present particular dangers, and thus may be proscribed altogether. In *Ohralik v. Ohio State Bar Assn.*,²⁵⁷ for example, the Court sustained a categorical prohibition of in-person promotion of legal services to accident victims, recognizing that such a practice is particularly conducive to overreaching and manipulation on the part of the lawyer.²⁵⁸ "Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights," thus serving the information proliferating function of the modern commercial speech doctrine, the Court concluded that "the very plight of that person not only makes him more *vulnerable to influence* but also may make advice all the more intrusive."²⁵⁹

I believe that the lawyer advertising cases provide an excellent opportunity to understand how the commercial speech doctrine might countenance a ban on the advertising of junk food to children. Lawyer advertising is an area in which the Court feels particularly confident to make judgments about consumer vulnerability to commercial speech.²⁶⁰ In *Bates*, the Court wrote:

256. *Id.* at 200 n.11. The lawyer in *In re R. M. J.* had, in a fairly large font on his print advertisement, indicated that he was admitted to practice before "THE UNITED STATES SUPREME COURT." *Id.* at 197. Apparently being admitted to the Supreme Court bar requires only the filing of some paperwork, provided the applicant is already a member of the bar elsewhere in the United States. See SUPREME COURT OF THE UNITED STATES, INSTRUCTIONS FOR ADMISSION TO THE BAR, <http://www.supremecourtus.gov/bar/barinstructions.pdf> (last visited Jan. 28, 2006); SUPREME COURT OF THE UNITED STATES, APPLICATION FOR ADMISSION TO PRACTICE, <http://www.supremecourtus.gov/bar/barapplication.pdf> (last visited Jan. 28, 2006). The *In re R. M. J.* Court found that the speech was protected, but only because the government failed to allege manipulation, something the Court certainly seemed open to hearing:

[S]uch a statement *could* be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court. Yet there is no finding to this effect by the Missouri Supreme Court. There is nothing in the record to indicate that the inclusion of this information was misleading. Nor does the Rule specifically identify this information as potentially misleading

In re R. M. J., 455 U.S. at 205–06 (emphasis added).

257. 436 U.S. 447 (1978).

258. *Id.* at 467–68.

259. *Id.* at 465 (emphasis added).

260. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. . . . In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.²⁶¹

Once it is understood that many consumers of junk food "lack[] sophistication"²⁶² in relation to junk-food products in the same way that the Court appears willing to see consumers lacking sophistication with respect to legal services, then the same latitude for the regulation of junk-food advertising will open up as the Court has indicated would be available to the states in the regulation of lawyer advertising. When approaching legal analysis from the critical realist perspective, it becomes clear that we, that is, most consumers, stand with respect to the power of market actors just as vulnerably as legal clients have long been understood to stand with respect to the power of lawyers.²⁶³ Social scientists have broadly examined our intuitions about our own "sophistication" and where those intuitions might actually pose special "risk[s] of deception."²⁶⁴ There may be such a risk of deception in the market for junk food.²⁶⁵ The Court's reliance in the lawyer advertising cases on its own expertise and experience as members of the legal community reveals the Court's willingness to credit expertise in the determination of whether or not an advertising practice is misleading.²⁶⁶ Legislative adoption of social scientific findings with respect to junk-food

261. *Id.* at 383–84.

262. *Id.*

263. *See id.* at 379.

264. *Id.* at 404.

265. There is substantial evidence, summarized *supra* Part II.B.1, that our intuitive view of our own eating behavior is mistaken in ways that leave us vulnerable to exploitive influence. *See also Broken Scales*, *supra* note 3, at 1675–82 (describing important counter-intuitive features of the human eating system).

266. *See generally Bates*, 433 U.S. at 383 (reasoning that the public, in contrast to legal professionals, lacked the sophistication necessary to realize the significance of certain statements in legal advertising).

consumption can provide that understanding.²⁶⁷

To explore more deeply the contours of this jurisprudence, consider another lawyer advertising case, *Zauderer v. Office of Disciplinary Counsel*,²⁶⁸ which involved a lawyer's advertisement seeking clients who may have been harmed by the infamous "Dalkon Shield" intrauterine device.²⁶⁹ The Court readily accepts the state's assertion that the lawyer's advertisement—which stated that "if there is no recovery, no legal fees are owed"—was misleading, and hence could be banned outright.²⁷⁰ Grappling within an area of its own expertise, the Court does not need a social scientist to know which way the wind blows:

The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs"—terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a

267. It is also possible to see some features of the Court's jurisprudence in this area as relating more particularly to the substantial interest that people have in obtaining access to information about the availability of legal services. The Court repeatedly takes notice of the fact that many people often do not pursue their legal rights because they do not know how to get a lawyer or how much one will cost. *Bates*, 433 U.S. at 376. The interests at stake in the cases are palpable. There is clearly a similarly substantial interest with respect to the purchase and consumption of food, a basic and necessary consumer choice of nearly every American, and one which also involves significant, though often unseen, health risks.

268. 471 U.S. 626 (1985).

269. The Dalkon Shield was a popular birth control device, introduced in the early 1970s, which came to be associated with a myriad of serious health problems, including birth defects and infertility. *See generally* MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985) (discussing corporate disregard for the harms associated with the Dalkon Shield, in the interest of profit maximization).

270. *Zauderer*, 471 U.S. at 652.

survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead."²⁷¹

And so the Court upheld the prohibition of lawyer advertising that promised no "fees" were owed unless the client recovered.²⁷² The analysis was guided by the Court's learned appreciation of the fact that consumer intuitions in the consumer context under review may be misled by the advertising in ways a mere intuitive or common sense understanding of the advertising would miss.²⁷³ The analysis sanctifies the deployment of counterintuitive understanding in the analysis of the constitutional status of commercial speech.

Also at issue in the case, however, was a state regulation prohibiting the use of any illustrations in lawyer advertising.²⁷⁴ The Court overturned that prohibition, describing the drawing in the defendant's advertisement as "an accurate representation of the Dalkon Shield."²⁷⁵ The Court touched on the subtler issues, raised for the first time in this case, about the power of advertising in a way that must be grappled with in any effort to ban junk-food advertising to children:

The use of illustrations in advertising by attorneys, the State suggests, creates unacceptable risks that the public will be misled, manipulated, or confused. Abuses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions. Because illustrations may produce their effects by operating on a subconscious level, the State argues, it will be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative. Thus . . . the State's argument is that its purposes can only be served through a prophylactic rule.²⁷⁶

The Court rejected the State's argument, but it is important to see, it rejected it on empirical grounds—that is, on the grounds that the State did not provide evidence, such as social scientific evidence,

271. *Id.* at 652–53 (internal citations omitted).

272. *See id.* at 653.

273. *See id.* at 652.

274. *Id.* at 633–34.

275. *Id.* at 647.

276. *Id.* at 648.

in support of its argument concerning the power of illustrations in lawyer advertising:

The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban. . . .

Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the *general argument* that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But . . . broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations.²⁷⁷

In *Zauderer*, the government once again stipulated that the advertising actually at issue in the case, including the illustration used in the advertising, was *not* misleading.²⁷⁸ The government, therefore, was stuck arguing that the threat of misleading illustrations in advertising was so great that it justified banning even the assertedly nonmisleading advertisement that the Court had in front of it.²⁷⁹ Such an argument is insufficient to rebut the dispositionist intuitions that the Court is left to employ in its review of the advertising prohibitions; such intuitions presume that information is useful to consumers, not that it is manipulative.²⁸⁰ It is little surprise then that the state's abstract claims about the manipulative power of illustrations in advertising were unavailing. The analysis, however,

277. *Id.* at 648–49 (emphasis added).

278. *Id.* at 634.

279. *See id.* at 649.

280. *Id.*

might look very different upon the adoption of a critical realist view, backed by social science, about how consumers actually respond to different kinds of advertising with respect to particular services or goods. The Court's own treatment of the "fees" and "costs" issue, guided by its own casual empiricism in the specific area of legal services, suggests availing precedent for such an analytic endeavor.²⁸¹

In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,²⁸² in reviewing the Illinois Supreme Court's sanctioning of an attorney for using letterhead that the Illinois court deemed misleading with respect to the lawyer's credentials,²⁸³ the Court made clear that it would "exercise *de novo* review" over a lower court's holding that contested commercial speech was misleading,

281. My point in discussing *Zauderer* has been to suggest both the Court's demand for, and its openness to, evidentiary support for prohibitions against "misleading" methods of advertising that are counterintuitive or unfamiliar. Nevertheless, lest *Zauderer* be thought to require too burdensome a showing before a state may ban a method of advertising, it should be emphasized that it was only after *Zauderer* that the Court first explicitly stated that, in the commercial speech context, the least restrictive means are *not* required before the Court would sanction a regulation furthering a substantial government interest. See *id.* at 651–52 n.14. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), the Court clarified:

[W]hile we have insisted that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," *we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete*, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "fit between the legislature's ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable . . .

Id. at 480 (emphasis added) (omission in original).

282. 496 U.S. 91 (1990).

283. The letterhead stated that the lawyer was a "Certified Civil Trial Specialist-By the National Board of Trial Advocacy" and "Licensed [by] Illinois, Missouri, and Arizona." *Id.* at 96. The Illinois Supreme Court held that the letterhead was unprotected by the First Amendment because it was "misleading," in that consumers "could" be led to believe that the attorney was "certified" by some government agency and that such certification "tacitly attests" to the lawyer's qualifications, when in fact the certification came from a private organization with no government mandate or authority. *Id.* at 98–99.

positioning the issue squarely as one of law.²⁸⁴ In its *de novo* review in *Peel*, the Court explicitly confirmed its previously-implicit view that there is a jurisprudential *presumption* that "truthful, relevant information"²⁸⁵ is *not* misleading: "The Commission's concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment."²⁸⁶ Where there is no factual evidence presented to rebut that presumption, then the issue of whether or not advertising is "misleading" must be decided only by judicial discretion—and where hunches are decisive, the Court's hunches trump all others.²⁸⁷

Because no evidence was presented to the contrary, the presumption that the factually true statements in Peel's letterhead were not misleading prevailed: "We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television. . . . Given the complete absence of any evidence of deception in the present case, we must reject the contention that petitioner's letterhead is actually misleading."²⁸⁸ The Court's incantation of "paternalism" here means something very different than does its use of the same term in *Virginia Pharmacy*.²⁸⁹ In *Virginia Pharmacy* the Court used the term to refer to the illegitimacy of the government's concern that people would use truthful, nonmisleading information in a manner contrary to their own best interests;²⁹⁰ here the concern is with the characterization of whether people are in fact misled by information or not. The former is normative, but the latter is positive, with normative implications. Where the positive question is argued on

284. *Id.* at 108.

285. *Id.*

286. *Id.* at 111.

287. *See id.* at 108–11.

288. *Id.* at 105–06. Applying its *de novo* review, the *Peel* Court found that "the letterhead was neither actually nor inherently misleading." *Id.* at 110. Relying again on its own knowledge and experience, the Court was "satisfied that the consuming public understands that licenses [to drive cars, to operate radio stations, to sell liquor] are issued by governmental authorities and that a host of certificates [to commend job performance, to convey an educational degree, to commemorate a solo flight or a hole in one] are issued by private organizations." *Id.* at 103.

289. *See supra* Part III.A.2.

290. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769–70 (1976).

intuition, the Court is very willing to substitute its own judgment for that of the government or the lower court that it is reviewing; but the Court has nevertheless indicated a willingness to show deference to actual findings by the government regarding what is misleading or not.²⁹¹

Having glimpsed the Court's latent sensitivity to the situational character in these lawyer-advertising cases, I return now to the Court's assessment of Massachusetts's billboard tobacco advertising ban in *Lorillard*. Again the government waived the first part of the *Central Hudson* test and stipulated that the advertising it sought to ban was not false or misleading.²⁹² Thus, the principle opinion had no occasion to depart from the dispositionist presumptions at the heart of the commercial speech doctrine, and no reason to examine the advertising regulation at issue as doing anything other than "imping[ing] on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products."²⁹³

Justice Thomas's concurring opinion in *Lorillard*, while calling for the application of strict scrutiny and the abandonment of any "commercial speech" category of First Amendment analysis, provides a provocative suggestion for how government might build the case for an advertising ban that could effectively respond to the problem of unseen manipulation within advertisements and still pass constitutional muster.²⁹⁴ After highlighting that Massachusetts had *waived* the question of whether the prohibited advertising was false

291. Another lawyer advertising case, *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988), for example, can be seen to signal the Court's appreciation that "puffery" can be misleading in a way that may permit a legislature to regulate the form and context, the situating of otherwise truthful, nondeceptive speech: "To be sure, a[n] [advertisement] letter may be misleading if it unduly emphasizes trivial or 'relatively uninformative fact[s].'" *Id.* at 479. In *Shapero* the Court remanded for a finding as to whether the emphasis at issue in the advertising before it was "undue," and therefore "misleading." *Id.* at 479–80.

292. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001).

293. *Id.* at 565. Sensing that there might be something more subtle, and possibly pernicious, happening in the tobacco advertising at issue, Justice Stevens would have remanded the case for further development of the issues. *Id.* The Court declines to do so because "the State had ample opportunity to develop a record," and had not done so. *Id.*

294. *Id.* at 572 (Thomas, J., concurring).

or misleading, Thomas chastised the state for nevertheless filling its briefs with arguments about the misleading power of tobacco advertising.²⁹⁵ He then responded to the issue himself, with language that may prove useful to the kind of advertising regulation I have in mind:

Respondents suggest that tobacco advertising is misleading because "its youthful imagery and . . . sheer ubiquity" leads children to believe "that tobacco use is desirable and pervasive." . . . [S]ee also Brief for the United States as *Amicus Curiae* 7 ("[S]o many children lack the maturity in judgment to resist the tobacco industry's appeals to excitement, glamour, and independence"). This justification is belied, however, by the sweeping overinclusivity of the regulations. Massachusetts has done nothing to target its prohibition to advertisements appealing to "excitement, glamour, and independence"; the ban applies with equal force to appeals to torpor, homeliness, and servility. It has not focused on "youthful imagery"; smokers depicted on the sides of buildings may no more play shuffleboard than they may ride skateboards.²⁹⁶

The tone is sardonic, but it should not be dismissed as unserious—it reflects a theme that runs throughout the Court's commercial speech jurisprudence. It suggests that a ban that focused on promotional methods traditionally dismissed as mere "puffery," or other methods that were unrelated to the perceived informational value of commercial speech, would be constitutionally permissible.²⁹⁷

This concept is undertheorized in existing case law. Part of the work of this Article is to help flesh it out. Presently, incoherence tends to emerge in the Court's efforts to span the profound gap

295. *Id.* at 578. In *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the Court stated:

The dissent may . . . be suggesting that the Government has an interest in banning the advertising of compounded drugs because patients who see such advertisements will be confused about the drugs' risks. . . . This argument is precluded, however, by the fact that the Government does not argue that the advertisements are misleading.

Id. at 376.

296. *Lorillard*, 533 U.S. at 578.

297. *Id.* at 571–90.

between the core justification for protecting commercial speech, and the reality of the unseen, manipulative power of much contemporary commercial advertising. Thomas, for example, wrote:

[T]he State's apparent view [is] that the simple existence of tobacco advertisements misleads people into believing that tobacco use is more pervasive than it actually is. The State misunderstands the purpose of advertising. Promoting a product that is not yet pervasively used (or a cause that is not yet widely supported) is a primary purpose of advertising. Tobacco advertisements would be no more misleading for suggesting pervasive use of tobacco products than are any other advertisements that attempt to expand a market for a product, or to rally support for a political movement. Any inference from the advertisements that businesses *would like* for tobacco use to be pervasive is entirely reasonable, and advertising that gives rise to that inference is in no way deceptive.²⁹⁸

While Thomas's characterization of "the State's apparent view" of the situational power of advertising is incomplete, it is, once again, not a bad start.²⁹⁹ His reply to the problem posed by that view, however, is a non sequitur. That the advertising accomplishes what the advertiser wants it to do—expand the market for its product—is hardly evidence that it is not misleading, as Thomas seems to argue. The idea that he started out criticizing was that advertising, or the "sheer ubiquity" of tobacco advertising noted in the previous quote from Thomas, misleadingly makes it look like smoking is more prevalent than it actually is, and thus induces more consumption of the product than it would if it were not misleading in that fashion.³⁰⁰ Indeed, such an argument would be well supported by social psychological findings with respect to human belief formation.³⁰¹ But Thomas insists that the more reasonable inference

298. *Id.* at 578–79 (emphasis added).

299. *See supra* text accompanying notes 9–10 (employing Thomas's summary take on the problem of childhood obesity).

300. *See id.*

301. *See* Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 113–15 (discussing social psychology's findings regarding the "false consensus" effect and "pluralistic ignorance," and the vulnerability to manipulation that these processes suggest).

is . . . that tobacco advertisers or other advertisers want there to be more consumption of their product than there currently is.³⁰² The issue of the advertising being misleading is left sitting there, still waiting for some comprehensive jurisprudential integration.

It is important at this juncture to make the point that although the Court's *presumption* that truthful commercial speech is not misleading is not fatal to the junk-food advertising ban proposed by this Article, it is, nevertheless, a misguided presumption. The presumption is neither theoretically nor empirically supported—it is advanced by intuitive dispositionism and an under-theorized "anti-paternalism."³⁰³ Indeed, in light of the analysis in the foregoing sections, it might seem that commercial speech should be considered presumptively misleading, and thus presumptively subject to regulation.

The core of the commercial speech doctrine rests on the assumption that market actors respond to pre-existing consumer preferences and that commercial speech facilitates the satisfaction of those preferences.³⁰⁴ In this Article, I have emphasized that commercial speech in the form of mass-marketed advertising often influences consumers in powerful ways that consumers do not anticipate or appreciate, and that exercising such situational influence can be extremely profitable to corporations. The Court recognizes that commercial speech can remain robust even in the face of aggressive regulation—the profit motive will find a way to comport with the regulation and still be heard.³⁰⁵ *For the very same reason*, corporate speech that is *not* regulated will discover and comport with whatever methods of advertising will accomplish the manipulation of the consumer in the most profitable fashion.

The very robustness of commercial speech should give rise to a suspicion about the unseen power of such speech. When one begins with the situational character, and appreciates the situational power of advertising and the ability of powerful corporations to exercise that power, the analysis suggests that if any presumption is adopted, the presumption should be that the advertising will be misleading.

302. *Lorillard*, 533 U.S. at 578–79.

303. Cf. David Yosifon, *Choice Fetishism and the Libertarian Paternalist Imagination* (unpublished manuscript, on file with author).

304. See *supra* text accompanying notes 166–172.

305. See *supra* text accompanying notes 179–180.

This presumption is also warranted because, as the analysis above suggests, it will prove extremely difficult for dispositionist individuals, governments, and courts to perceive the *misleading* qualities of the advertising, and take issue with them.³⁰⁶

2. Reconciling *Posadas* and *44 Liquormart*: Towards a Critical Realist Understanding of the Commercial Speech Doctrine

Up to this point, my argument has been that where the Court sees consumer behavior as reflecting individual, dispositional choice, it rebuffs commercial speech regulation. Where it appreciates that there are powerful situational influences on consumer behavior, where behavior is or threatens to be misled by the advertising, rather than the advertising abetting a consumer choice, regulation is allowable. The Court clearly has a dispositionist prejudice: the government has the burden of showing situational influence.³⁰⁷ The Court seems to recognize that in areas where its own expertise is limited (perhaps all areas outside of the regulation of lawyers) the government may be the authority on how consumers respond to different types of advertising.³⁰⁸ Advocates of commercial speech regulation have focused too heavily on the second part of the *Central Hudson* test, to the detriment of a richer understanding of the commercial speech doctrine—one capable of sustaining the ban I propose.

In promulgating such a ban, it would be critical for government to cease searching for legitimate reasons to suppress the effect of advertising that the government admits is truthful and non-misleading. That approach is too vulnerable to normative and doctrinal cries of paternalism. The purpose and design of speech regulation must instead be to ensure that advertising does not overreach and manipulate consumers in ways they do not anticipate or appreciate—such a purpose is much easier to justify and fits within the Court's teachings. To enable such a regulatory project, legal theory can show that much more of commercial speech is misleading than mere intuition supposes, and that far less consumer behavior reflects rational, dispositional behavior than is commonly believed.

306. See *supra* text accompanying notes 198–200.

307. See *supra* text accompanying notes 238–239.

308. See *supra* Part III.B.1.

With this aim in mind, I would like to address the widely shared belief that the most recent commercial speech cases, such as *44 Liquormart* and *Lorillard*, represent a clear ratcheting-up of commercial speech protection on the part of the Court.³⁰⁹ I will focus on the widely shared view of commentators that *44 Liquormart* overruled *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,³¹⁰ and expunged any remnants of that controversial case, and its permissive posture towards commercial speech regulation, from the Court's commercial speech jurisprudence. *Posadas* was a 1986 decision that upheld a Puerto Rico law forbidding all casino advertising to Puerto Rico residents by casinos within Puerto Rico.³¹¹ The law did not forbid casinos from directing their advertising at non-resident tourists within or outside its territory.³¹²

As usual, the government did not argue that the advertising it sought to restrict was false or misleading; instead the government passed directly to claiming that the restriction nevertheless accomplished a substantial government interest in reducing citizen gambling in a sufficiently tailored fashion.³¹³ I have argued that a central vein running through the modern commercial speech cases, from *Virginia Pharmacy* through *44 Liquormart*, is that the government may not suppress dispositional decision-making through speech regulation. *Posadas* may thus seem anomalous, as most commentators suggest.³¹⁴ Close examination of the case, however, suggests that *Posadas* never really departed from this principle, and further that *Posadas* actually reflects the imminent appreciation of the situational character that I have suggested has always been a part of the commercial speech doctrine. Under my analysis, *Posadas*,

309. See generally Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123 (concluding many Supreme Court Justices have begun to give commercial speech close to full First Amendment protection).

310. 478 U.S. 328 (1986).

311. *Id.* at 347–48.

312. *Id.* at 362 (Stevens, J., dissenting).

313. *Id.* at 342–43. Justice Stevens analyzed the Fourteenth Amendment equal protection issues raised by Puerto Rico's ban. See *id.* at 359–63.

314. See Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693 (2002) (summarizing academic critiques of *Posadas*).

which the Court has never explicitly overruled, survives to aid the junk-food advertising ban I propose, while 44 *Liquormart* would not bar it.

Posadas can be reconciled with the central principle that the First Amendment forbids suppression of truthful nonmisleading speech for the purpose of repressing dispositional choice, if it is seen that that despite the fact that the government did not argue the issue, the Court appreciated that Puerto Rico actually sought to suppress casino advertising because of its *misleading* influence, in powerful, unseen ways, on Puerto Rico residents.³¹⁵ Writing for the Court, Justice Rehnquist noted that "[t]he particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not misleading or fraudulent, at least in the *abstract*."³¹⁶ But in his analysis, Justice Rehnquist leaves the abstract behind and speculates about the *reality* of casino advertising:

Appellant contends . . . that the First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might encourage such gambling, but by promulgating additional speech designed to discourage it. We reject this contention. We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico *are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such*

315. On this reading, the only thing that was "wrong" with *Posadas*, from a doctrinal standpoint, was its acceptance of a *total* advertising ban, not its countenancing the Puerto Rican legislature's avowed purpose of reducing its own citizens' casino gambling habits. Yet, the Court may have been moved in some measure by the fact that Puerto Rico residents were no doubt aware of the availability of casino gambling, due to all of the advertising directed at tourists on the island. For a similar discussion regarding *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), see *infra* text accompanying notes 325–332.

316. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 340–41 (1986) (emphasis added).

*potentially harmful conduct.*³¹⁷

Language such as this provides grounds for a jurisprudential understanding that, while the core of the commercial speech doctrine views advertising as proliferating information that enables consumers to make informed, dispositionally driven choices, it also appreciates that other advertising might threaten to *induce* consumption in a way that is not reflective of dispositional choice, and which may be subject to regulation without offending constitutional values.³¹⁸ Where the Court strikes down advertising restrictions, it does so because it sees the restraint of free choice; where regulation of advertising is allowed it is not because it is thought that it is constitutionally permissible to interfere with free choice, but, rather, because it is understood that choice is not at issue at all, and what the regulation is doing is preventing *inducement* or

317. *Id.* at 344 (emphasis omitted) (emphasis added). Justice Rehnquist goes on to cite *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc): “We do not believe that a less restrictive time, place restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state’s concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that *advertising will unduly promote alcohol consumption despite known dangers.*” *Id.* at 751 (emphasis added).

318. For example, consider a hypothetical casino advertising campaign repeatedly showing a woman at a roulette table smiling widely, celebrating a winning spin, the name and location of the casino appearing superimposed over the image or images. If a legislature were to take notice of the fact that humans tend to make probability assessments in terms of how easily examples of particular outcomes come to mind, rather than by analyzing mathematical fashion the actual likelihood of an outcome, then a legislature would be justified in finding this hypothetical advertising campaign to be misleading with respect to a gambler’s chances of winning at roulette. See Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 67–71. What appears to be unremarkable or unactionable puffery when one begins with a stylized rational actor conception of human decision-making becomes highly significant when one begins with a more truthful understanding of how humans think. Nothing in the First Amendment requires Congress to patronize a particular conception of the human mind when passing regulations to forbid misleading commercial speech, which under most views of the First Amendment is a permissible government purpose. See, e.g., *In re R.M.J.*, 455 U.S. 191, 203 (1982) (noting that states can prohibit misleading advertising). This picture of the First Amendment gives credence to the Court’s oft repeated assurance that “if there be any danger that the people cannot evaluate . . . information . . . it is a danger contemplated by the Framers of the First Amendment.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978); see *infra* Part IV (analyzing *Bellotti*).

stimulation that has little to do with consumer choice.³¹⁹ How advertising will be viewed in a particular case depends strongly on whether it is analyzed through a conceptual framework based in intuition, or one steeped in social science.

This analysis also aids Rehnquist's otherwise dubious claim in *Posadas* that Puerto Rico may impose its casino advertising ban because "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling. . . ."³²⁰ The Court had renounced that position in *Virginia Pharmacy*; indeed, the falsity of that view with respect to commercial speech is the whole point of the modern commercial speech doctrine. But Rehnquist's statement, read as part of the "inducement" argument I am highlighting here, evades the tangles of the Court's unconstitutional conditions doctrine altogether.³²¹ Justice Rehnquist wrote:

It would . . . surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid *the stimulation of demand for the product or activity through advertising* on behalf of those who would profit from such increased demand.³²²

Rehnquist's argument here rests on a very different conception

319. Compare *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001) (striking down advertising restrictions that prevented adults from obtaining information about legal products), with *Posadas*, 478 U.S. at 348 (upholding ban on the advertising of gambling casinos aimed at Puerto Rico residents).

320. *Posadas*, 478 U.S. at 345–46.

321. The Court later explicitly repudiates the "greater power includes the lesser" argument as applied to the regulation of commercial speech. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996):

Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. . . . Thus, just as it is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance, we think it equally clear that its power to ban the sale of liquor entirely does not include a power to censor all advertisements that contain accurate and nonmisleading information about the price of the product.

Id.; see also Berman, *supra* note 314, at 726–30 (explaining the "greater power including the lesser" doctrine).

322. *Posadas*, 478 U.S. at 346 (emphasis added).

of the relationship between advertising and human behavior than that reflected in the downward-sloping demand curve trope of *Virginia Pharmacy*, but it does not rest on a different view of what is permissible in commercial speech regulation.³²³ Rehnquist's argument is one that sees the consumer as a situational character, one vulnerable to "the stimulation of demand"³²⁴ that could be accomplished through the unseen influence of advertising. This figure, I have been arguing, while usually in the background, is no stranger to the Court's commercial speech jurisprudence. The government may not regulate speech where doing so interferes with dispositional choice; what it may do, however, is regulate commercial speech that merely "stimulates" demand for the product by exercising situational influence over vulnerable situational characters. A similar view is evident in *United States v. Edge Broadcasting Co.*,³²⁵ a post-*Posadas* case in which the Court upheld a federal statute forbidding radio stations located in states that prohibited lotteries from broadcasting advertisements for lotteries, even if the advertisements concerned lotteries in adjacent states.³²⁶ The majority sustained the total ban.³²⁷

In *Edge*, the state once again waived the first step of the *Central Hudson* analysis. Thus, the Court again did not squarely analyze the potential falsity or misleading nature of the proscribed advertising. Nevertheless, in considering the second part of the *Central Hudson* test, whether the ban was narrowly tailored to accomplish the state's asserted interest in curbing lottery consumption, the Court again revealed a sensitivity to the situational character, and an appreciation that commercial speech might mislead consumers in powerful, unseen ways that are not entitled to constitutional protection. This is not fully articulated in the Court's opinion, but read closely its analysis is fascinating.

323. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976) (Rehnquist, J., dissenting).

324. *Posadas*, 478 U.S. at 346.

325. 509 U.S. 418, 432–33 (1993). The newly appointed Chief Justice John Roberts was on the brief for the government as Deputy Solicitor General in support of the constitutionality of the statute. Brief for Petitioners, *United States v. Edge Broad. Co.*, No. 92-486 (1993).

326. *Edge Broad.*, 509 U.S. at 432–33.

327. *See id.*

At a crucial point in *Edge*, the Court turns to the radio station's claim that the regulation should be struck because the ban was not fit to serve, and did not serve, the purpose that the state claimed for it.³²⁸ The radio station argued that consumers living at the northern tip of North Carolina, where the station at issue was broadcasting, were inevitably apprised of the fact that there was a lottery going on just across the border in Virginia, how much it cost to play, where tickets could be bought, etc.³²⁹ Consumers learned such information from advertising circulating from Virginia into North Carolina, and they even heard about it on their radios while listening to radio stations broadcasting from Virginia.³³⁰ The Court rejected this argument and provocatively, if incompletely, recognized that advertising may affect listeners in ways unrelated to informing dispositional choice.³³¹ The Court seemed to appreciate that the constant repetition of advertising might have some other effect on consumers that a legislature could remedy without violating the First Amendment:

Even if all of the residents of Edge's North Carolina service area listen to lottery ads from Virginia stations, it would still be true that 11% of radio listening time in that area would remain free of such material. If Edge is allowed to advertise the Virginia lottery, the percentage of listening time carrying such material would increase from 38% to 49%. We do not think that *Central Hudson* compels us to consider this consequence to be without significance.³³²

328. *Id.* at 429. If the regulation did not advance the asserted government interest it would be restricting commercial speech for no good reason, and would fail the *Central Hudson* test. *See supra* Part III.A.2.

329. *Edge Broad.*, 509 U.S. at 431–33.

330. *Id.* at 418.

331. *Id.* at 435.

332. *Id.* at 432–33. *Edge Broadcasting* is another good case illustrating the Court's concern about total bans; it seems that one of the reasons that the Court upholds the prohibition is because citizens *are* otherwise exposed to information about the lottery, so the intuitive downward-sloping demand curve tale can be satisfied. Indeed, under the analysis advanced here, the fact that residents of North Carolina are apprised of the existence of the lottery and on what terms participation may be had, would cut in favor of North Carolina's regulation—it seems doubtful that the Court would have sustained the ban if its effect were to keep North Carolina residents entirely ignorant of the fact that there are lotteries in Virginia.

There is something about the "consequence" of being exposed to eleven percent more lottery advertising that is allowed to matter in the commercial speech doctrine. There is something in this "consequence" that the government permissibly sought to remedy when it "legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. . . . even if the North Carolina audience is not wholly unaware of the lottery's existence."³³³

Without passing at least intermediate—and for some justices, strict scrutiny³³⁴—the government may not prevent the dissemination of truthful, nondeceptive, nonmisleading information about lawful activities. It apparently may never prohibit truthful nonmisleading commercial speech for the purpose of retarding dispositional choice. But in truth, nobody ever really argues that the First Amendment countenances the use of speech regulation to suppress free choice on the paternalistic grounds that people make bad choices when presented with truthful, nonmisleading speech. Rather, as my treatment of the cases has argued, the government's concern is usually, at heart, that the advertising is powerfully misleading in ways consumers do not appreciate.

The structure of the *Central Hudson* test de-emphasizes the inquiry about the false or misleading nature of commercial speech. However, as I have argued, the Court has recognized that the government has discretion to determine what kind of advertising is misleading, and in certain circumstances may conclude that whole

333. *Id.* at 434. Such a premise would find support both in social science and corporate practice. The "mere exposure effect" is a well-documented phenomenon in social psychology that refers to the fact that merely being exposed to a particular stimulus will influence subjects' subsequent preferences for the stimulus, even where they have no conscious awareness that they had been previously exposed to it. For example, subjects exposed to pictograms at a rate too rapid for them to consciously notice, will later prefer the pictogram they were exposed to over one that they had never been exposed to. See Hanson & Yosifon, *The Situational Character*, *supra* note 21, at 44–50. Contemporary commercial advertising campaigns bear witness to corporate understanding of this phenomenon. See, e.g., Rachel Deahl, *Get 'Em While They're Young: Do Chains Change How Students Think About Bookstores*, BOOK STANDARD, July 1, 2005, http://www.thebookstandard.com/bookstandard/news/retail/article_display.asp?vnu_content_id=1000972711.

334. Chief Justice Roberts's support for *Central Hudson* as Deputy Solicitor General, see *supra* note 325, probably yields little insight into how he will approach the commercial speech doctrine as a jurist.

methods of advertising are misleading. The government will stand on firmer ground in this respect when it relies on contemporary social science, in particular social psychology, which suggests that far more of contemporary advertising may rightly be called "misleading" than may be intuitively suspected under a common sense, intuitively grounded conception of human decision-making.

One of the reasons that the commercial speech doctrine is underdeveloped is because government has not embraced a satisfying theoretical justification for the restrictions it seeks to impose. Government interest in curbing the misleading and exploitive power of advertising requires a steady commitment to the critical analysis of commercial speech and to the nature of human agency. Dispositionism cannot provide the necessary theoretical underpinnings for an effective and justifiable approach to commercial speech regulation, leaving such efforts vulnerable to the cries of paternalism and "mind control"³³⁵ that are used by critics of such regulation to influence jurists, legislatures and legal theorists. My argument endeavors not only to deepen understanding of the possibilities of the commercial speech doctrine, but also to provide a deeper understanding of the purposes of commercial speech regulation.

3. Tombstone Blues—Banning Junk-Food Advertising to Children

The problem with junk-food advertising, as I described in the previous section, is that it influences consumers' thoughts and behaviors in powerful ways that they do not anticipate or appreciate. These influences may be highly detrimental, or even deadly. Earlier I explored this reality through an inquiry into the power of "puffing" to influence consumption in ways that consumers, contemporary regulatory regimes, and the common law do not appreciate, and which has therefore long gone unregulated.³³⁶ The tombstone blues is a proposal aimed at prohibiting tactics such as "puffing," and other powerful, unnamed methods of influence, in the advertising of junk-food products to children. The proposal comports with the commercial speech doctrine, as this Article has thus far analyzed it.³³⁷

335. See Redish, *supra* note 153, at 639.

336. See *supra* Part II.C.2.

337. These arguments easily support a refashioning of the puffery doctrine in

The commercial speech doctrine will not sustain an absolute ban on all advertising. Where a regulation bans all commercial speech regarding a legal product or service, a central justification for allowing greater regulation in the commercial speech context—the robustness of commercial speech and the wherewithal of commercial enterprises to get valuable speech out in ways other than that prohibited by government regulation—is no longer in play.³³⁸ Without the robustness justification, review of total bans approaches the strict scrutiny standard that the Court applies to regulation of non-commercial speech.³³⁹ Further, an absolute advertising ban necessarily includes a ban on price advertising, providing an easy opportunity to exercise the core dispositionist script concerning the relationship between markets, advertising, and consumer behavior, which resides at the heart of the commercial speech doctrine.³⁴⁰

Thus, the tombstone blues is not a complete ban. The Court's jurisprudence instead counsels in favor of a *near* complete ban, but one that still allows advertising in a limited, highly prescribed tombstone format. Junk-food advertising would be limited to a brief description or picture of the product, its price, information about where it can be purchased and basic nutritional information. The tombstone blues approach insures that useful information is produced and circulated, while it restricts the kind of manipulation that corporations use freely under the present regulatory framework. It makes good on the central promise of the commercial speech doctrine to endow the information proliferating power of commercial

regards to advertising directed at children; I will argue that they support a general refashioning of the puffery doctrine. As the social science reviewed earlier makes clear, children do not distinguish between statements of fact and sales-pitch “boasting.” Story & French, *supra* note 74, at 3. Nevertheless, for reasons explored earlier and reiterated here, I believe that an effective ban of junk-food advertising to children requires banning nearly all such advertising to adults as well. Thus, I examine the constitutional viability of a near total ban on junk-food advertising to adults. See *supra* text accompanying notes 150–163.

338. See *supra* text accompanying notes 222–223.

339. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502 (1996) (“[N]either the ‘greater objectivity’ nor the ‘greater hardiness’ of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference.”).

340. See *supra* Part III.A.2.

speech with First Amendment protection,³⁴¹ because it only bans non-informational content. While some valuable speech may be curbed by a tombstone blues ban, the sacrifice is marginal in light of the grave social problem it may help solve.³⁴²

The federal government's traditionally strict limitation on advertising to promote a public offering of securities is an example of the kind of ban I propose.³⁴³ Prior to SEC approval of a public offering's registration statement, written advertisements³⁴⁴ of the proposed sale have, until very recently, been limited to what was known as a "tombstone" format that did "no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the [SEC] . . . may permit."³⁴⁵ No other written advertising of the securities, let alone

341. N.Y. Times, Co. v. Sullivan, 376 U.S. 254 (1964).

342. But see Zywicki et al., *supra* note 76.

343. See generally Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990) (providing a comprehensive analysis of the relationship between the commercial speech doctrine and federal securities regulation). In December of 2005, the SEC implemented significant reforms in its regulation of securities offerings. E.g., Securities Act of 1933, 17 C.F.R. § 230.134 (2005); see also FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, MEMORANDUM TO OUR FRIENDS AND CLIENTS, SECURITIES OFFERING REFORM: A SYNOPSIS (2005), http://www.ffhsj.com/cmemos/050822%20securities_%20offering%20reform.pdf (summarizing the new rules regarding communications in a public offering of securities, as well as providing some comparison to the old rules). While the December 2005 amendments may undercut to some degree the utility of the federal regulation of securities advertising as a living example of the kind of regulatory regime I am arguing would be wise and viable for junk-food advertising, the securities regime as it existed prior to the amendments nevertheless remains a useful programmatic and justificatory touchstone for my project. It remains to be seen what effect the December 2005 amendments will have on consumer protection concerns in the securities market.

344. The securities rules use "[t]he term 'prospectus' [that] means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security." 15 U.S.C. § 77b (a)(10) (1982).

345. *Id.* "[N]o promotion of an upcoming [public] offering is possible until the registration statement, including the preliminary prospectus, has been filed for review with the SEC. As originally conceived, the 'waiting period,'" which is the period of time *after* the registration statement and preliminary prospectus have been filed for SEC review, but *before* the registration statement passed SEC review and becomes effective, "was intended to enable the agency to preclear the registration statement." Estreicher, *supra* note 343, at 281. So, during this waiting period, the company that is issuing securities

puffing, was permitted in the period before SEC approval of the proposed sale, out of fear that consumers might be misled concerning the true value of the security that would ultimately be issued.³⁴⁶ After the required registration statement was declared "effective" by the SEC, making the securities ripe for sale, the securities could be marketed more extensively, though only if preceded or accompanied by a prospectus, the form and content of which is prescribed by statute.³⁴⁷

and its financial intermediaries "are prohibited from engaging in direct writing campaigns or any media advertising. [The intermediaries] can, however, utilize their substantial lists of established customers to advertise orally, conditioning the market and attempting to solicit offers to buy through personal telephone calls throughout the waiting period." *Id.* at 280–81.

346. See Estreicher, *supra* note 345, at 281–82. The December 2005 amendments significantly expand, though still limit, the kind of information that can be provided in tombstone advertising. Securities Act of 1933, 17 C.F.R. § 230.134 (now permitting, *inter alia*, statements concerning the nature of the firm's business, final maturity and interest rate provisions on fixed income securities, descriptions of offering procedures, and expected rating agencies). The recent liberalization of Rule 134 still describes a highly limited advertising regime (especially as compared to, for example, contemporary junk-food advertising), and remains backed by the fundamental concern that consumers of securities are vulnerable to overreaching on the part of sellers. In the securities context, the tombstone advertising limitation is meant to lead potential consumers to inquire further about the security by asking for a copy of the highly detailed prospectus that fully describes the offering. See Estreicher, *supra* note 343, at 280. The tombstone blues regime would incorporate the same approach, allowing, indeed requiring, junk-food promoters to maintain a highly specific and detailed "prospectus" regarding the food they sell. Incorporating the "prospectus" into the tombstone blues approach provides cover against the Court's instruction that "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive . . ." *In re R. M. J.*, 455 U.S. 191, 203 (1982).

347. Estreicher, *supra* note 343, at 282. The December 2005 amendments provide greater leeway for firms to "free write," that is, to promote their securities without the required accompaniment of a prospectus, as long as the prospectus is made available to consumers who may desire to inspect it. Securities Act of 1933, 17 C.F.R. § 230.134 (2005). Free writing is, of course, still subject to the strong anti-fraud provisions otherwise embodied in the securities laws. See Securities Offering Reform, SEC Release No. 33-8591 (Dec. 1, 2005) (adopting release), at 148. Such provisions do not admit of the kind of puffery that is sanctioned in less regulated markets, such as the junk-food market. As one leading treatise put it, the puffing doctrine in the securities regulation context "has all but gone the way of the dodo." 7 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3424 (3d. ed. 1991). *But*

This familiar system of regulating the promotion and sale of securities provides a very powerful example of extensive governmental limitations on advertising which, at least until very recently, were widely viewed as entirely appropriate.³⁴⁸ Nothing about the reforms implemented by the SEC in 2005 suggests that the previous regime was impermissible; indeed, in promulgating its reforms the SEC was responding to perceived efficiency concerns, not constitutional pressures.³⁴⁹ Justifications traditionally advanced for curbing commercial speech in the securities area are at least as applicable to food advertising to children; most importantly, the relative un-sophistication of the consumer vis-à-vis the seller, and the vast disparities in their relative access to information.³⁵⁰ It took a major social crisis—the Great Depression—before the justifications

see Jennifer O'Hare, *The Resurrection of the Dodo: The Unfortunate Re-Emergence of the Puffery Defense in Private Securities Fraud Actions*, 59 OHIO ST. L.J. 1697 (1998) (arguing that while the federal securities laws clearly indicate a congressional desire to eclipse conventional puffery defenses, courts have nevertheless afforded defendants too liberal an opportunity to make use of this defense).

348. See Estreicher, *supra* note 343. Indeed, the recent liberalizing reforms adopted by the SEC were spurred by efficiency concerns, not Constitutional pressures. See Securities Offering Reform, SEC Release No. 33-8591, at 297 (Dec. 1, 2005); Securities Offering Reform, SEC Release No. 33-8501 (Nov. 3, 2004) (proposing release). As an aside, consider the relative power of those who benefit from extensive government regulation of securities promotion—relatively affluent members of society who are able to actively trade in the securities market—against the relative poverty and powerlessness of those who suffer disproportionately the ill effects of what I have argued are misleading, yet unregulated, junk-food advertisements.

349. The SEC's defense of its reforms makes no mention of First Amendment concerns. See, e.g., Securities Offering Reform, SEC Release No. 33-8591. Comments to the SEC on the proposed reforms prior to their adoption did not appear to make First Amendment arguments either. See SEC, Comments on Proposed Rule: Securities Offering Reform, <http://www.sec.gov/rules/proposed/s73804.shtml> (visited on Dec. 20, 2005) (collecting comments to the SEC on its proposed, now adopted, reforms).

350. See Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 533–39 (1999) (discussing the history, purpose, and scope of the securities laws). See generally 2 J. S. ELLENBERGER & ELLEN P. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 (1973) (stating that the general purpose of the legislation is to protect the public and provide the public with complete information regarding securities transactions).

for pervasive regulation of securities became clear.³⁵¹ The obesity epidemic is this generation's major social crisis that should make the justifications for regulating the junk-food market clear. The expansive definition of a "misleading" statement from the securities arena can be exploited to develop extensive, but constitutionally viable, limitations on fast food advertising.³⁵²

351. Estreicher, *supra* note 343, at 291.

352. In his analysis of hypothetical tobacco advertising regulatory regimes, Professor Redish concludes that a tombstone approach would run afoul of the First Amendment. Redish, *supra* note 153, at 638. Redish's argument against tombstone advertising is no different than his general argument against advertising bans; he uncritically presumes that the prohibited advertising is comprised of "persuasive appeals" rather than misleading speech, and then concludes that the paternalistic purpose behind prohibiting such appeals cannot be countenanced. *Id.* at 627. Redish stretches his basic idea about speaker interests:

[A] speaker's ability to choose the manner of expression should not be viewed as uniquely tied to the speaker's developmental interest, but to the listener's free speech rights as well. In the case of tombstone limitations, restrictions on the speaker's ability to choose the method of expression derive from the same unacceptable paternalistic concerns that underlie a total ban: the fear that the public will be induced, *on the basis of persuasive appeals*, to engage in a lawful activity because the government does not trust the public's ability to make judgments on the basis of those appeals.

Id. (emphasis added).

The tombstone blues approach, however, is motivated not by a paternalistic purpose, but by a concern that junk-food advertising is powerfully misleading. *Cf. supra* text accompanying note 348 (observing that the SEC adopted a tombstone approach because securities advertising could mislead consumers about the value of the security). Tombstone advertising limits would curtail the misleading effects of junk-food advertising while protecting First Amendment values. Redish assumes away the possibility that the banned advertising is false or misleading, thus does not thoroughly address how to analyze that question. *See id.* Redish uses intuition and dispositionism to quickly move on: "Bluntly put," he writes, "prohibition of tobacco advertising constitutes a governmental exercise in mind control of its citizens—hardly a course of action consistent with the . . . First Amendment right of free expression." *Id.* at 639. This is an easy argument to make and a comfortable conclusion to reach when you are content to believe that the only way to exercise "mind control" is by *restricting* speech. But, if "mind control" is on the table as a concern, then the power of misleading speech to exercise "mind control" should be a dire theoretical and programmatic concern; a concern that cannot be solved through "blunt" conclusions about what tobacco advertising prohibitions might accomplish.

So why stop at a junk-food advertising ban—what is the limiting principle in a project such as this? The limitations of the inquiry are bound by the requirements of the commercial speech doctrine and the First Amendment, the limitations of empirical inquiry, and by theoretical imagination. This Article's conclusions have been reached through a critical realist exploration of the constitutional permissibility of a near-total ban on junk-food advertising to children. Critical realism does not promise, and does not provide, deductively applicable answers to every legal problem, as some approaches purport to do. Nor does critical realism stagnate in analytic indeterminacy, as other approaches are sometimes said to do. Nothing in the foregoing analysis should be read to suggest that the government has, or should have, plenary authority to regulate speech, or even commercial speech.

The human suffering wrought by the obesity epidemic is palpable.³⁵³ This suffering gives rise to a suspicious inquiry into the junk-food marketplace, and junk-food advertising in particular, which has led to this Article's conclusions. An analysis of the consumer market in blue jeans, or the consumer market in concrete, or in mortgages, might reach different conclusions. Blue jeans advertisements, for example, use puffing strategies similar to those of junk-food advertisements. Yet the absence of dramatic increases in heart disease and kidney failure, diabetes, and premature death associated with the over-consumption of blue jeans may suggest that its advertising is not misleading in the same way as junk-food advertising; i.e. with respect to the health problems associated with the consumption.

I have not argued that puffery is inherently misleading speech, even in commercial advertising, nor does my argument inexorably lead to such a conclusion. Puffery may enable the exploration and expansion of the possibilities of individual or collective identity formation through, for example, the consumption of blue jeans endowed with a cool expression of human flourishing through creative discursive practices in its commercial advertising.³⁵⁴ The

353. See *supra* text accompanying notes 62–64; see also *Broken Scales*, *supra* note 3, at 1649–52 (describing the health problems and social costs associated with overweight and obesity).

354. See generally PETER N. STEARNS, *AMERICAN COOL: CONSTRUCTING A TWENTIETH CENTURY EMOTIONAL STYLE* (1994) (providing a social history of

enormous power of commercial speech to advance such exploration is both a reason to grant commercial speech constitutional protection and a reason to keep a close eye on its power to mislead consumers. My argument has stayed within the Court's commercial speech jurisprudence, even as it has attempted to creatively expand it. There are particular kinds of products and consumer markets that are highly susceptible to powerfully manipulative advertising campaigns; the junk food for children market is one of them. My analysis honors and advances the incrementalism and caution found in the Court's First Amendment jurisprudence.

Still, my suspicious inquiry cannot keep from rousing another kind of suspicion protecting First Amendment interests: the concern that the arguments advanced here may be applied not just to legitimate commercial speech regulation, but also to legitimate the regulation of political and social speech in a manner that threatens core First Amendment values and perhaps even freedom itself. The manipulative power of political speech is, indeed, both evident and analytically troubling to the foundations of classical liberalism—it is a profound problem that cannot be ignored. While it is beyond the scope of this article to fully analyze or respond to that problem, the

the emergence of “cool” as an innovative emotional style that responded to, and advanced, modern alterations in work and social patterns). An important body of work in First Amendment scholarship has been dedicated to analyzing the centrality and impact of non-informational discursive practices in commercial advertising, and the evident disparity between “the eighteenth-century first amendment, with its emphasis on serious public discourse” and the “first-amendment triviality” wrought by “the self-indulgent bent of mass entertainment culture.” Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1116 (1990). For an excellent discussion of the First Amendment, see also RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (2d ed. 2005). My project, while similar in broad orientation to this tradition, also departs from it in significant ways. The critical realist approach advances through a framework more deeply steeped in social scientific and economic analysis than is witnessed in the less formal, autoschediastic “cultural approach” of scholars such as Collins and Skover. Ronald K.L. Collins & David M. Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783, 785 (1993). As is suggested by my statement in the text provisionally distinguishing between concerns presented by junk-food advertising and those presented by blue jeans advertising, my approach is also less concerned with broad critiques of the “triviality” of modern commercial culture than it is with the power of modern advertising to mislead consumers in a manner cognizable within the modern commercial speech doctrine.

next Part, which is necessary to the advancement of the tombstone blues project, begins a critical realist approach to it.

IV. RETHINKING "COMMON SENSE DISTINCTIONS": THE PROBLEM OF DEEP CAPTURE AND A CONSTITUTIONALLY PERMISSIBLE RESPONSE TO IT

While one may impugn the *motive* of corporate commentary on matters of public concern, it is much harder to morph the content of such commentary itself.³⁵⁵

—Rodney Smolla

One of the principle ways that the food industry has attempted to avoid responsibility for the harms associated with the obesity crisis is by arguing that even if over-consumption of its products causes obesity, it is consumers who are responsible for the outcome, since the industry is only responding to, and not inducing, consumer demand.³⁵⁶ The food industry promotes this view of consumer behavior to courts, government, legal theorists, and to consumers themselves. Indeed, much corporate speech is dedicated to the promotion of dispositionism, which, it turns out, is an extremely effective strategy in the court of public opinion, and in government. In my previous work with Hanson, we call this process "deep capture."³⁵⁷

Certainly dispositionism is promoted through conventional product advertising.³⁵⁸ But "deep capture" is pursued in many other ways as well. A full elaboration of such methods is beyond the scope of this Article, but one illustrative example that my co-authors and I featured in *Broken Scales* was the food industry's financing of "issue advocacy" groups that do not shill corporate products directly, but instead actively promote—to consumers and regulators—the dispositionist conception of human agency on which maximal profit

355. Smolla, *supra* note 124, at 1287.

356. See *Broken Scales*, *supra* note 3, at 1797–98 (exploring this argument in the context of the obesity epidemic); Hanson & Yosifon, *The Situation*, *supra* note 21, at 249–50 (explaining the basic form of this argument).

357. See Hanson & Yosifon, *The Situation*, *supra* note 21, at 202–20 (describing the deep capture hypothesis); see also *supra* text accompanying note 58 (describing deep capture).

358. See *Broken Scales*, *supra* note 3, at 1709–11 (describing the promotion of dispositionism in conventional advertising; e.g., "You asked for, you got it!" (Toyota), "Have it your way!" (Burger King), etc.).

thrives.³⁵⁹ Consider, for example, an outfit known as The Center for Consumer Freedom, a corporate-funded organization dedicated to "promoting personal responsibility and protecting consumer choices."³⁶⁰ One way this organization seeks to advance its purpose is through print and broadcast advertising.³⁶¹ For example, a print advertising campaign promulgated by the group presents a picture of a dangling belt; the caption above the belt reads in large letters: "Common Sense Obesity Warning."³⁶² Below the belt (so to speak), the ad reads: "At the Center for Consumer Freedom, we think adults are smart enough to choose what to eat and when to move. The only warnings you really need are about food cops, bureaucrats, and trial lawyers."³⁶³ This organization also produces radio, television and Internet advertising campaigns with similar themes.³⁶⁴

For corporations to be funding this kind of advertising, it must be important to their bottom line, and it must be working.³⁶⁵ Thus,

359. *See id.* at 1747–48.

360. The Center for Consumer Freedom, About Us <http://www.consumerfreedom.com/about.cfm> (last visited Jan. 31, 2006); *see also Broken Scales*, *supra* note 3, at 1742–43 (elaborating on this organization's role in combating junk food regulation); Hanson & Yosifon, *The Situation*, *supra* note 21, at 249–50 (discussing this organization); .

361. *See* The Center for Consumer Freedom, <http://www.consumerfreedom.com> (last visited Aug. 18, 2005).

362. *Id.* (follow "Ad Campaigns" hyperlink; then follow "Print Ads" hyperlink; then select advertisement number 14). In the smaller print of the advertisement, the notches of the belt are labeled as if to indicate the occasion on which the belt was expanded; they read, serially: "The Sopranos, Season Three," "Wife's Lasagna," "Bought Sony PlayStation," and "Hired Lawn Service." The Center for Consumer Freedom, Common Sense, Obesity Warning, http://www.consumerfreedom.com/images/ads/fullsize/print_obesity_belt.jpg (last visited Jan. 31, 2006). The humor is part of how the advertisement works. But notice the complete absence of any mention of junk food, let alone junk-food advertising. *Id.* Interestingly, the advertisement is sponsored by the food and restaurant industry and yet there is no mention of their food in this advertisement's discourse on the causes of obesity.

363. Center for Consumer Freedom, Print Ads, http://www.consumerfreedom.com/advertisements_detail.cfm/ad/22 (last visited Jan. 31, 2006).

364. *See* The Center for Consumer Freedom, Home, <http://www.consumerfreedom.com> (last visited Aug. 18, 2005) (describing these campaigns).

365. *See* Hanson & Yosifon, *The Situation*, *supra* note 21, at 277 n.523 (analyzing the importance of staged financing in ensuring that institutions supported by corporate money indeed serve the corporate purpose).

such deep capture efforts pique the analytic impulse at work in the previous sections, which were concerned with the misleading power of conventional product advertising. However, this kind of speech, which is social and political in nature, may lay claim to greater First Amendment protection than that afforded the conventional commercial speech analyzed above. In *Bolger v. Youngs Drug Product Corp.*,³⁶⁶ the Court held that pamphlets circulated through the mail by a manufacturer of contraceptives constituted commercial speech, and thus would be analyzed under the intermediate scrutiny standard of *Central Hudson*.³⁶⁷ That the pamphlets, in addition to promoting the name of the company's product, provided important non-commercial information regarding sexually transmitted diseases, did not compel a stricter standard: "A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions."³⁶⁸ There are two challenging principles in this holding. The first is that companies enjoy full First Amendment protection when speaking on social or political issues.³⁶⁹ The second is that the Court seems to be saying that one of the *reasons* that it allows the government greater latitude when it comes to regulating purely commercial speech is *because* social and political speech by the same commercial speakers would be entitled to the "full panoply" of First Amendment protections, so there is no threat to such speech.³⁷⁰

These conclusions, however, are only the point of departure for inquiring into the permissibility of regulating deep capture advertising; it is not the end of the inquiry. The Court's oft-repeated claim, cited from *Bolger*, that companies are entitled to the "full panoply" of First Amendment protections when speaking on political and social issues,³⁷¹ at least as applied to *corporate* speech, is an exaggeration of its own jurisprudence on the issue. In my view, the

366. 463 U.S. 60 (1983).

367. *See id.* at 68 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

368. *Id.*

369. *Id.* at 69.

370. *Id.* at 68.

371. *See id.*

Court's actual jurisprudence in this area is sufficient, analytically and normatively, to sustain the regulation of corporate deep capture advertising.

In a formative case in 1978, *First National Bank of Boston v. Bellotti*,³⁷² the Court reviewed a Massachusetts statute that forbade corporations from expending corporate funds to influence any public referenda that did not bear materially on its business.³⁷³ The Massachusetts legislature passed the statute after corporate funds had been spent fighting several successive failed public referenda seeking to amend the state Constitution to allow for graduated personal income taxes.³⁷⁴ The statutory prohibition included a provision specifying that any referenda on personal income taxes was to be considered immaterial to the business of any bank or business corporation.³⁷⁵ Prior to *Bellotti*, the Court had already held that it was within the government's power to limit corporate campaign donations to particular candidates for public office.³⁷⁶ Insulating the political system from the intimation of corruption that accompanies such financing was viewed as sufficient justification for the limitation on political contributions, even under a strict scrutiny standard.³⁷⁷ But in *Bellotti*, the Court declined to extend that reasoning to allow the government to forestall campaign financing by corporations in public referenda.³⁷⁸ The Court simply found that the corporate funding of referendum campaigns does not emit as coarse a stench of political corruption as does corporate financing of individual campaigns.³⁷⁹

As in the conventional commercial speech cases, the Court does not approach its analysis from the perspective of the corporate speaker, but rather, from the perspective of listener interests: "The

372. 435 U.S. 765 (1978).

373. *Id.* *Bellotti* was decided as the Court forged the modern commercial speech doctrine in cases like *Virginia Pharmacy* and *Bates*. *Bellotti* itself is thus a crucial pillar in modern commercial speech jurisprudence, broadly construed.

374. *Id.* at 769.

375. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).

376. *Bellotti*, 435 U.S. at 786–87 n.24 (citing, *inter alia*, *Buckley v. Valeo*, 424 U.S. 1 (1976)).

377. *See id.* at 788–89.

378. *Id.* at 787–88 n.26.

379. *Id.*

proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. . . . [I]nstead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect."³⁸⁰ From this perspective, the Court saw corporate speech on the referenda at issue in *Bellotti* to be precisely the kind of expression the First Amendment was meant to protect: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."³⁸¹ Since the identity of the speaker is irrelevant to the value of the speech, social and political speech is important enough to merit full First Amendment protection even where the speakers are corporate entities. Thus, *Bellotti* is often cited as a case that gave full First Amendment protection to corporate social and political speech.³⁸²

From this Article's perspective, however, *Bellotti* is better read for its promise that corporate social and political speech *could* be regulated where the unregulated power of such speech perverted, rather than served, First Amendment values. Though it found that Massachusetts's statute failed strict scrutiny, the Court issued a provocative reservation:

Appellee [Massachusetts] advances a number of arguments in support of [its] view that [First Amendment] interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an *undue influence* on the outcome of a referendum vote, and—in the end—destroy

380. *Id.* at 776.

381. *Id.* at 777.

382. See, e.g., Martin H. Redish & Howard M. Wasserman, *What's Good For General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998). Not everyone saw it as a positive development. See *id.* at 257 n.162 ("[*Bellotti*] paid only lip service to the rights of listeners" and served the interests of "the privileged few who can spend unlimited amounts of money to purchase political effectiveness." (quoting J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609, 641 (1982))); see also Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 662 (1981–1982) (providing a penetrating critique of *Bellotti* and Professor Redish's views about corporate social and political speech).

the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may *drown out* other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been *overwhelming* or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.³⁸³

The analysis provides a germ of a justification for regulating corporate social and political speech. Indeed, it reveals, once again, a latent sensitivity to the reality of the situational character in the Court's First Amendment analysis. As my exegesis of the situational character emphasized above, we have limited perceptive and cognitive capacity. We are at least potentially vulnerable to being "overwhelm[ed]" by some stimuli to the exclusion of being able to reckon with others. That is all the Court recognized in *Bellotti*—but it is a decisive commitment to reality.³⁸⁴

383. *Bellotti*, 435 U.S. at 789–90 (emphasis added) (citations omitted). Justice White dissented, criticizing the majority for not accepting evidence before the Court that, prior to the enactment of the ban under review, corporate expenditures on referendums had far outpaced that of other participants in such referendums. *See id.* at 809–11. (White, J., dissenting). The majority rebutted White, claiming that the Court had before it only incomplete information on corporate and other expenditures on referendums, and that in any event it was clear that corporate money was not such an influential voice in the referendum after all, because the income tax referendum failed again in Massachusetts while the case was pending, even though corporate money was not spent in the referendum. *Id.* at 790 n.28. The Court apparently did not appreciate that corporate expenditure in previous versions of the referendum, which also had failed, may have had lasting effect on public opinion in subsequent referendums.

384. *Id.* at 789–90. It is important to note that where the Court addresses regulation of conventional commercial speech it looks at the falsity or misleading nature of the speech, or the success of the regulation in advancing a substantial government interest in a tailored fashion. *See, e.g.,* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68–72 (1983). Where the Court addresses corporate political speech, however, these questions drop out of the

This conception has not yet fully matured in First Amendment theory, but it is budding. For example, in *Austin v. Michigan Chamber of Commerce*,³⁸⁵ the Court upheld a Michigan law prohibiting corporations from using funds from the corporate treasury to support or oppose candidates for state offices.³⁸⁶ The law did permit expenditures from segregated corporate funds used solely for political purposes.³⁸⁷ Justice Thurgood Marshall's opinion for the Court in *Austin* relied first on the disproportionate power that corporations have as a result of state conferred advantages provided by the corporate form, and second on the reality of human limitations respecting information processing.³⁸⁸ The Court found that the state's limitation on corporate political speech permissibly aimed to remedy "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."³⁸⁹

picture and the Court focuses on the *volume* of such speech and its power to potentially overwhelm or exclude other speech. See, e.g., *Bellotti*, 435 U.S. at 789–90. So in the political speech context there is once again recognition of the situational character, but it is a different aspect of the situational character, one which does not require any argument about situational influence being false or misleading, but rather simply that such influence is overwhelming, therefore harming rather than serving First Amendment interests.

385. 494 U.S. 652 (1990).

386. *Id.* at 706.

387. *Id.*

388. *Id.* It might be thought that the "state conferred benefit" approach to justifying the regulation of corporate political speech raises the "greater power contains the lesser" analytic fallacy, but it does not. Government does not have a right to regulate corporate speech simply because government could crush corporations altogether. Rather, the Court accepts government's claim that the very creation of corporate organizational forms *without* concomitant speech regulation would powerfully distort important First Amendment values. *Id.* at 659–60. Government is simply trying to create efficient business forms that do not become Frankenstein monsters as far as First Amendment values are concerned.

389. *Id.* at 660. The Court took pains to emphasize that the latitude it allows for the regulation of political speech by profit-oriented business corporations does not apply to the political speech of social and political organizations. See *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (holding limitations on political speech by non-profit social and political organizations to be unconstitutional).

Professor Redish, disapproving of *Austin*, argues that in it "the Court appears to have either ignored or at least partially abandoned the principles it had wisely recognized in *Bellotti*."³⁹⁰ I think that it is better to say that the Court in *Austin* made good on the promise of regulatory latitude that it very clearly made in *Bellotti*. *Austin* suggests that the "overwhelm[ance]" idea from *Bellotti* survives to provide a jurisprudential basis for the regulation of deep capture advertising.³⁹¹ Today, there is substantial evidence that corporate spending has come to dominate social and political debate in this country to such an extent that it threatens to overwhelm other voices.³⁹² Corporate deep capture campaigns, replete with astro-turf organizing, the maintenance of front groups, and the sponsorship of knowledge production at both think tanks and elite universities, suggests that corporate advocacy of social and political interests is far more pervasive and sophisticated than it was in 1978, when *Bellotti* was decided.³⁹³ Whether the present Court would be willing to make good on its reservation with respect to "overwhelming" speech in *Bellotti* and *Austin* is questionable, but the theory supporting it is sensible, and the evidence to invoke it is available.³⁹⁴

390. Redish & Wasserman, *supra* note 382, at 236.

391. *Austin*, 494 U.S. 659–60. In *Bellotti*, the Court also stated that a corporation could be required to explicitly claim responsibility for the political speech that it funded. 435 U.S. at 809. Such a requirement would serve the information proliferating purpose of corporate political speech, but would not be permitted with respect to speech by natural persons. Requiring the prominent identification of corporate sponsorship in the deep capture advertising such funding produces would go a significant way toward combating the misleading nature of such advertising.

392. To further develop the "overwhelming" angle suggested by the Court in *Bellotti* and employed in *Austin*, a satisfying inquiry must be guided by contemporary teachings of social science. A simple tally of voices or an accounting of money spent will not suffice. Rather, it must be recognized, for reasons explained above, that the sophistication with which a corporate giant develops and conveys "political speech" may be substantially greater than that which a public interest group or politically motivated individuals can bring to it.

393. See Hanson & Yosifon, *The Situation*, *supra* note 21, at 213–33 (discussing the breadth of contemporary deep capture efforts).

394. *Bellotti* pertained to corporate financing of public referendum campaigns. 435 U.S. 765. The kind of deep capture advertising that I have highlighted in this section is generally not directed, at least explicitly, at the advocacy of a particular referendum issue, or even a particular piece of legislation. Rather, these advertisements, like those by the Center for

In any event, I find cause for hope in Redish's lament that "although the doctrinal messages sent by the Court undoubtedly have been mixed, the modern trend appears unmistakably away from extending full-fledged constitutional protection to corporate speech."³⁹⁵

Redish takes issue with the "overwhelmance" approach in a manner that might serve as a general rebuttal to the entire analytic project advanced in this Article. Redish appreciates the logical cogency of the "overwhelmance" approach to commercial speech regulation, but insists that the evidence is indeterminate as to whether such conditions obtain in contemporary society, with respect to corporate speech; in the face of such ambiguity, we must err in favor of allowing unfettered speech.³⁹⁶ For Redish, however, the indeterminacy that he finds regarding the question of speech "overwhelmance" is, in the end, a *necessary* conclusion. Indeed, he concludes that critically driven inquiry of human perception and

Consumer Freedom, are directed at the development of public opinion in furtherance of the corporate enterprise generally, whether it is in forestalling regulation, legislation or referenda, or even more generally to perpetuate a social atmosphere conducive to the consumption of corporate products. *See supra* text accompanying notes 358–365. There is nothing in *Bellotti*'s principle that would, if the case were made, forestall its application to the kind of deep capture advertising I am treating here. Fighting its way through thickets of speech and association issues, the Court has allowed limitations on some kinds of corporate political spending for good reason; once the problem of deep capture is appreciated, these limitations can be extended to social issue advertising as well.

395. Redish & Wasserman, *supra* note 382, at 238. Following Professor Redish's example of restraint in his seminal commercial speech article, I will stop short of claiming that political and social speech by corporations should be subject to the exact same level of scrutiny as "common sense" commercial speech, like product advertising. Determining the precise level of scrutiny must be the subject of further theoretical elaboration, as would the design of a programmatic regulatory approach to deep capture advertising, which may or may not resemble the tombstone blues ban of junk-food advertising suggested in this Article. *See supra* Part III.B.3.

396. Redish & Wasserman, *supra* note 382, at 289 (citations omitted) ("To the extent that guaranteeing economically powerful corporations' First Amendment rights would displace expression of others, the constitutional analysis this Article adopts in the prior section might require revision. No one, however, has made a persuasive argument—on either intuitive or empirical grounds—that such is actually the case.") (citations omitted). This is reminiscent of Professor Redish's claim that the evidence is ambiguous as to whether consumers are misled by tobacco advertising. *See supra* text accompanying notes 199–200.

information processing is impossible if the First Amendment is to be preserved. We are bound, he insists, to our intuitive experience of ourselves.³⁹⁷ "In short," Redish writes:

one cannot construe the First Amendment to allow the government conclusively to determine either how citizens process information or when the fear of an information overload dictates a need for governmental intervention. Society can never be sure that such a point ever exists, much less that citizens have, in fact, reached it.³⁹⁸

But what kind of conception of human agency would one have to embrace to believe that we cannot be sure that "such a point ever exists" at which human beings are beset with "information overload?" Are we not finite beings—are our minds not limited? Contrary to Redish's doubts, we can be *certain* that such a point exists. Indeed, we must know that all of our thinking about the world is shaped by our limited capacity to perceive and grapple with all that is happening in it. Commercial speech analysis should begin at precisely the place that Redish claims is off-limits to inquiry.

Redish argues:

[n]o matter how often or loudly one disseminates expression . . . '[i]f democracy is to have meaning, we must generally assume that speech affects voting behavior only when it persuades.' Indeed, neither the First Amendment nor the democratic system of which it is a part could function under any other premise.³⁹⁹

This is a debilitating presumption, an anti-liberal one in that it insists on faith and the blind restraint of critical inquiry. In his commercial speech analysis Redish is obsessed with consistency, but it is hardly consistent with the principles behind the First Amendment and the democratic system to accept ignorance due to fear of the implications of examination. Indeed, Redish and other commentators insist that a paternalistic purpose of maintaining human ignorance for people's own good can never be countenanced by the First Amendment—surely, then, such a purpose should not be

397. Redish & Wasserman, *supra* note 382, at 294–97.

398. *Id.* at 290 (quoting David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 574 (1991)).

399. *Id.* at 268.

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countenanced at the core of First Amendment theory.

V. CONCLUSION: RESISTING DEEP CAPTURE

I have endeavored to elucidate a fresh understanding of the commercial speech doctrine, one that abandons dispositionist presumptions within the doctrine and accommodates the reality of the situational character by developing situational sensitivity that is already latent in the commercial speech doctrine. The tombstone blues junk-food advertising ban provides an outline for a critical realist approach to commercial speech regulation that could effectively respond to the childhood obesity epidemic without violating constitutional interests. The examination of deep capture advertising provides a basis for understanding commercial speech that goes beyond "common sense distinctions," and provides a more critical approach to corporate social and political speech.

These arguments are made in a political climate that may have little enthusiasm for their conclusions. Senator Harkin's proposal to extend the FTC's regulatory authority over advertising directed at children⁴⁰⁰ may come to pass, but nothing like a tombstone blues junk-food advertising ban appears on the horizon. Yet, I hope that the analysis of the commercial speech doctrine advanced by this article may have a progressive political effect, in that it may show the possibility of a potent approach to regulating commercial speech that will not offend constitutional values.

400. See *supra* note 160 (describing Harkin's proposal).

